No. 2899

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED REAL ESTATE AND TRUST COMPANY, a corporation,

Appellant,

vs.

LUCIEN A. BLOCHMAN, UNION TITLE COMPANY OF SAN DIEGO, formerly Union Title & Trust Company, a corporation, UNION TRUST COMPANY OF SAN DIEGO, a corporation, LA BINDA PARK SYNDICATE, a corporation, UNITED STATES NATIONAL BANK, a corporation, R. W. HASKINS, CHARLES R. KIBLER, THOMAS J. HAMPTON, F. M. KINNE, JOHN PALMER KEEP, J. W. DEERING, M. D. GOODBODY and WILLIAM O. SANFORD,

Appellees.

Reply Brief of Appellees, Union Title Company of San Diego and Union Trust Company of San Diego.

A. H. SWEET,
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Filed this.....day of March, 1917.

FRANK D. MONCKTON, Clerk

By.....Deputy

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It is to be regretted that the Opening Brief of Plaintiff was not framed more in accordance with the spirit of the rules promulgated by this Honorable Court for the preparation of briefs. An abstract or statement of the case, as we understand it, does not include deductions or legal conclusions of counsel, nor is it intended

as a medium of slurring other parties to the action, such as is apparent in this instance in the numerous insinuations and innuendoes directed against the integrity of these defendants, and their officers, unwarranted and having no basis in fact or law. It is also to be observed that the so-called "Further Statements of Facts", comprising one-half in volume of the Opening Brief, is as much argument as narrative, and neither argument nor narrative takes cognizance of the important factor of "knowledge", but assumes that knowledge of all the facts and transactions between plaintiff and each defendant is imputable to all the defendants jointly. In consequence, it becomes necessary for the trustee defendants to repeat herein much that appears in the Opening Brief in the discussion of facts, but, in so doing, they will be frank in saying that their discussion will be more in the line of argument than as controverting plaintiff's statement of the case, and, for that reason, although following generally plaintiff's order of treatment, will properly appear in the division of this brief allotted to argument. These defendants will be hereinafter referred to as the Trustee.

STATEMENT OF THE CASE.

As will appear from the foregoing introductory statement, the trustee defendants cannot approve or adopt plaintiff's so-called "General Statement of Nature of Case" and "Further Statement of Facts" in their entirety as a true or comprehensive statement of the case. In order to controvert plaintiff's statements, however, it will be necessary to consider the narrative of facts from an argumentative standpoint, in the order of the

Opening Brief, so as to connectedly show the falsity of plaintiff's conclusions of fact and law as they are set forth therein, and reference is, therefore, made to the extended discussion of those matters appearing herein.

To the statement of the general nature of the case, however, and to plaintiff's statement of the principal question raised by the appeal, it is necessary to add that another question of equal import with the validity of releases by the Trustee is raised by the appeal, and that is whether or not plaintiff can invoke the aid of a Court of Equity to foreclose the Trust Agreement as an equitable mortgage, some defendants contending that it cannot.

I.

ARGUMENT.

THE TRUSTEE WAS NOT DERELICT IN ITS DUTY.

This division of the case has been treated by the Opening Brief (pp. 4 to 43, incl.) as a Statement of Facts, as above pointed out, resulting in a chaotic confusion of fact and argument. It is hardly necessary to state that liability of a Trustee to a beneficiary may arise from two causes, the one, mistake, and the other, actual fraud. A trustee may, under a mistaken idea of his duties under the general law pertaining to him, or under his particular trust agreement, become liable for acts of damage to the trust estate, without any wrongful or malicious act or intent on his part; on the other hand, a trustee may commit actual fraud, and, although thereby actually benefitting the trust estate, he will, nevertheless, be penalized for it. The bills of complaint in this action contain no charge of actual fraud, and the alleged violations of duty of the trustee therein charged are,

therefore, conceded by plaintiff, at the inception of the case, as arising out of mistake alone; so that the scandalous matter in the Opening Brief is entirely out of order and without allegations upon which to base evidence to prove it.

In answering these charges the Trustee has endeavored to comport itself with the dignity attaching to its office, and without bitterness, but only with a commendable desire commanded by pride, to justify its acts in the eyes of the Court.

The trustee stands in such a peculiar relation to its beneficiaries and *cestui que trustent*, that to preserve the impartial and dignified attitude toward them imposed on it by law, makes it difficult indeed (if not impossible) for it to answer their uncalled-for taunts or refute unfounded accusations and at the same time say or do nothing which might be construed as a display of animosity. We trust that in this respect the Court will consider this portion of the argument as a righteous protest against the unjustifiable attempts of plaintiff to insinuate the trustee out of its proper place, and not as evidence that the latter is actuated by any ill will or adverse interests against plaintiff. The trustee has at all times been and now is ready and willing to faithfully and impartially complete the execution of the trust.

Introductory of these matters, it will not be amiss to state that the Trustee accepted its duties in this trust as they were set forth in the Trust Agreement, and that it had no other or further directions as to services expected of it. (Tr., pp. 354-376.) It has always construed the Trust Agreement as one in the nature of an ordinary deed of trust securing an indebtedness, its principal duty

being to hold the naked legal title until the debt was paid or the property sold by it upon a foreclosure sale in satisfaction of the debt; incidental to which, it was given the authority to receipt for (but not to enforce payment of) sums due from the equitable owner to the plaintiff, to make partial releases or reconveyances of the property in consideration of the payments reducing the debt, and to sign the beneficiary's subdivisional map to enable him to record it. Responsibility is present only where duty exists, and, between responsibility and duty, there must be an equal balance. There was no duty imposed on the trustee to see that Blochman's covenants, or any of them, were kept. Furthermore, its powers were either dormant, or passive, not active. Its power respecting the signing of the map came into being only when the map was presented to it by Blochman, and then its duty was imperative, and not discretionary. Its power respecting payments of or on the unpaid balance of the purchase price became effective only when payments were offered to it and that power embraced only acceptance of the sums and forwarding the amounts to the plaintiff; its power regarding sale would have come into being only upon default of the debtor and demand for sale by the creditor. It was in no sense the general agent or trustee of the plaintiff, or subject to the rules controlling the acts or duties of a trustee to sell, because it had no active powers, and, therefore, no responsibilities, which fact plaintiff recognizes by declaring the trustee's acts invalid for want of power, although, strange to say, it attempts in the same breath to fix upon the trustee the liability of an active trustee for sale. All the acting under the Trust Agreement was to be done by the payee and beneficiary.

This construction of the contract by the Trustee should be kept in mind in a consideration of the facts and it will plainly be seen that the trustee performed faithfully and impartially its duties as it understood them.

Plaintiff complains (Opening Brief, page 5) that there was no suggestion given it relating to the execution of any map by the trustee or the recording of any map, either in the Blochman letter of April 4, 1913 (Ex. 10, Tr., page 458), or at all until the Trustee's letter of December 24, 1913 (Ex. 81, Tr., page 538). But there was in force on April 4, 1913 (the date of Blochman's letter), the Act of the California Legislature of 1907 (Stat. 1907, p. 290), (See Opening Brief, page 90), relating to the recording of subdivisional maps, and reading in part as follows:

> "Sec. 1. Whenever any tract or subdivision of land shall be laid out into lots for the purposes of sale, the owner or owners thereof shall cause to be made out and filed with the County Recorder of the County in which the same is situated, an accurate map or plat thereof * * * * *
>
> "Sec. 3. Upon every such map or plat there shall be endorsed a consent to the making thereof, signed by the owner or owners of the tract or other subdivision of land shown thereon, and also by all other persons whose consent is necessary to pass a clear title to such land, * * * * *
>
> "Sec. 4. The map or plat so made, indorsed and acknowledged, shall * * * be presented to the * * * * City Council or other governing body * * * and said governing body shall indorse thereon which of the public highways offered by

said map or plat they *accept* on behalf of the public * * *

"Sec. 6. * * * * No map or plat referred to in this Act shall be accepted by the County Recorder for filing or recording unless the same shall in all respects comply with the provisions of this Act * * * * * *

"Sec. 8. No person shall sell or offer for sale any lot or parcel of land, by reference to any map or plat, unless such map or plat has been made, certified, indorsed, acknowledged and filed in all respects as provided in this Act * * * *

"Sec. 9. Every person who violates any of the provisions of this Act is guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine * * * or by imprisonment, * * * or by both * * *."

That the trustee was a person interested in the title to the land within the purview of the act is beyond question. Also, there was in force, as shown by plaintiff (Ex. 110, Tr., page 587, Opening Brief, page 41), Ordinance No. 4807 of the City of San Diego, *requiring compliance with the above statute* (which would include the signed consent of the trustee) and also providing (see Tr., page 593):

"Sec. 21. Whenever any such map or plat shall have been *accepted* by said Common Council, said Common Council shall direct the City Clerk of said City to file the same in the office of the County Recorder of the County of San Diego, State of California."

Now, in this letter of April 4, 1913 (Tr., page 458), (receipt of which was acknowledged in plaintiff's reply of April 8, 1913) (Ex. 13, Tr., page 461), Blochman says:

> "He (Hampton) found that the lines (of the tract) interfered with *other surveys* * * * furthermore, the City held him up for the *streets* which *cut out* about *five acres on three sides* of the tract, the *entire streets coming out of his property.* From this much land, in order to get *the number of lots* required in your contract, he found it necessary to resort to a great many *surveys,* and *finally it took him about two months to have his map accepted by the City Council.* * * * * * * so that, before Mr. Hampton *was in a position to make any sales,* he had to give back all the *deposits he received* and *has sold up to date only two lots* in the tract."

Acceptance by the Council implied the due recording of the map, for the Council was required to direct the City Clerk to record the map in the Recorder's office, by the terms of the ordinance above quoted, and they are both presumed to have done their duty.

> "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but, unless so controverted, the jury are bound to find according to the presumption."
>
> Sec. 1961, C. C. P. of Calif.
>
> "All other presumptions (than conclusive) are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be contro-

verted by other evidence. The following are of that kind: * * *

"15. That official duty has been regularly performed. * * *

"33. That the law has been obeyed."

Sec. 1963, C. C. P. of Calif.

Plaintiff was bound to know the Statute, the Ordinance and the effect of these presumptions. It charges the trustee with knowledge of them (Opening Brief, pp. 41 and 90). That the law was obeyed is apparent from an inspection of the map (Tr., page 585) whereon the Council's acceptance is attested by Allen H. Wright, City Clerk, on March 5, 1913, and on the same date the Recorder endorsed his filing certificate at the request of "Allen H. Wright".

Being in "a *position* to *make sales*" and having *"sold up to date two lots"* certainly implied a recording of the map according to the requirements of the 1907 Statute, for otherwise Hampton would not have been in a *position* to make sales, and could not lawfully have offered to sell or have sold a lot. The references to the extent and location of the streets and the number of lots and the surveys all were plain indications of the fact that a legal subdivision of the land had been completed. The fact that two lots had been sold and deposits of prospective purchasers of other lots returned plainly showed that a subdivision into lots had been made and the marketing of the subdivided tracts commenced.

Observe in the same connection similar language in the letter from Porter of October 27, 1913, (Ex. 66, Tr., p. 519) and from the Trustee of date October 30, 1913, (Ex. 67, Tr., p. 521) and telegram from Blochman of

November 28, 1913, (Ex. 75, Tr., p. 531) which telegram plaintiff candidly admits (Opening Brief, page 21) "was the first intimation to plaintiff that there had been any subdivision of the tract by execution of a map thereof by the Trustee and filing it for record", although the only matter in the telegram from which these facts might be inferred is the request for release of lots on payment of Seven Hundred Dollars. Verily, plaintiff must not alone plead ignorance of the law, but also of the English language, if it be allowed to rely on the words of this telegram and not on the letter of April 4th for its "first intimation" of a legal subdivision of the land. In which connection it is interesting to observe that plaintiff, in its scramble to escape the effects of imputable knowledge of the subdivision, tripped itself in declaring that it had not even a "suggestion" of the recording of the map until the Trustee's letter of December 24, 1913 (Opening Brief, pp. 5, 13 and 42) and then admitted that it received its "first intimation" of the facts in Blochman's telegram of November 28 (Opening Brief, p. 21). Not that the difference in the latter two dates is material, but merely to show that the plaintiff was not sufficiently concerned with the facts of subdivision as to know when it first received its information, until it tried to make an issue of the matter in this case and found that it could not do so, if at all, without repudiating knowledge.

The importance of this point must not be minimized, for the fact that knowledge of the fact of subdivision was brought home to the plaintiff, and plaintiff stands charged with notice, as early as April 8, 1913 (Ex. 12, *supra*), the date of receipt of this letter of April 4, 1913,

absolutely breaks down plaintiff's entire line of argument respecting its subsequent waivers.

Plaintiff attempts to take the trustee to task for not collecting its unpaid balances of the purchase price and interest when they were due. The Trust Agreement did not impose upon the Trustee the duty of making collections nor empower it to enforce payment. Recurring to its first "dunning" letters (Ex. 8 and 9, Tr., pp. 456 and 457) it will be seen that the letter to the Trustee of date March 25, 1913, was identical with that to Blochman, couched in the exacting language of the intolerant creditor to his debtor, as if the Trustee were either primarily liable for the payment or at fault otherwise. The Trustee, however, overlooked the discourtesy, and on April 8, 1913 (Ex. 16, Tr., p. 465) reported to plaintiff, in reply to its letter of March 25th, that it had referred the matter of delinquent interest to Blochman on several occasions. Allowing four days for plaintiff's letter of March 25th to reach the Trustee, would leave not more than ten days (including holidays) between receipt of the letter and its reply, so that the Trustee certainly displayed diligence in bringing the matter to Blochman's attention several times during that period (more especially since it was not bound to do so, and was not compensated for it). Moreover in that letter the trustee requested further advices and assured plaintiff that it would be guided by the latter's instructions. No bad faith here, surely.

Plaintiff makes much ado over the letter of Taggart, for the Trustee, to Hampton (Ex. 13, p. 462) wherein he declines to make releases until the delinquent interest has been paid. Any effect of this claimed in favor of

plaintiff is completely nullified by Taggart's testimony on direct examination (Tr., p. 367) wherein he plainly stated that he had read something into the Trust Agreement which was not there, and which, on cross examination (Tr., pp. 374-375) he could not find, that the letter was written on his initiative, that he could not then find or point out any provision in the Trust Agreement sustaining the stand taken in his letter, and that it was merely a common practice of his own in the conduct of the business of his office to make such requirements. Also that at no time after the letter did he wittingly release any trust property with knowledge that any interest was in default or had not been waived (which as to this trust, is amply proven).

Plaintiff also emphasizes the Trustee's telegram (misstated "letter" in the record) to it of date April 30, 1916, (Ex. 25, Tr., p. 476) concerning the personnel of a company being formed to take over Blochman's interest, which the plaintiff assumes (without any basis in fact) was intended to refer to La Binda Park Syndicate (Opening Brief, p. 10), whereas the transfer to La Binda Park Syndicate had taken place seven days previously (April 23, 1913) according to statement in the Opening Brief, (page 10) or two days previously (April 28, 1913) according to Blochman's letter (Ex. 26, Tr., p. 476); and the record does not connect in any wise the Trustee's telegram about the "Company now being formed", with the La Binda Park Syndicate which had already been formed and had acquired Blochman's interest. A new company, learning of plaintiff's exacting attitude, would doubtless have become alarmed and withdrawn from the field. In any event, in the absence of

proof to support the claim, it cannot be conclusively presumed that the latter corporation was the one referred to. Assuming for the purpose of argument that it was, however, is it not entirely possible that the "responsible people", whom plaintiff takes occasion to slur, became apprehensive or were alarmed by the exhibition of plaintiff's unwillingness to grant an extension, as evidenced by its telegrams and letters of the latter part of April and the early days in May (Ex. 21, Tr., p. 472; Ex. 22, Tr., p. 473; Ex. 24, Tr., p. 475; Ex. 27, Tr., p. 477; Ex. 29, Tr., p. 478; Ex. 31, Tr., p. 479; Ex. 32, Tr., p. 480), and consequently declined to negotiate further, or purchase stock in the Company?

In any event the plaintiff did not rely on any representations of the Trustee in its telegram of April 30th (Ex. 25, *supra*) but on the contrary disregarded them, for it telegraphed in reply on May 1, 1913 (Ex. 27, Tr., 477): "Already telegraphed notified parties that no extensions will be made", and followed this up with other messages, declaring the whole amount due (Ex. 29, 31 and 32, *supra*) thus showing its decision on the matter to have been final.

The message of the Trustee to plaintiff of date May 2, 1913 (Ex. 30, Tr., p. 479) is worthy of observation: "*Blochman* informs us he is reasonably sure of placing payment * * * not later than Wednesday next (May 8th) etc. * * *" Was not this sufficient notice to the plaintiff that it was still dealing with Blochman, and not the people mentioned in the Trustee's telegram, that the new company and the responsible people had withdrawn? Any doubt in the matter would surely have been dissolved by the telegram of June 10, 1913, from the Trus-

tee to the plaintiff (Ex. 44, Tr., 493) *"Blochman offers* for payment etc." At any rate the plaintiff elected to deal entirely with Blochman after that, and until it was advised of the names of the officers of the La Binda Park Syndicate (Ex. 32, Tr., p. 480; Ex. 46, Tr., p. 494; Ex. 47, Tr., p. 495), and in view of all these facts cannot be heard to say that it relied on the representation of the Trustee that the new company was composed of responsible people, in support of a claim for liability against the Trustee, nor is it justified in casting slurs at the Trustee (Opening Brief, pp. 13, 14) when by its very argument in which the insinuation occurs it shows (by reference to these communications) that it pinned no faith on the representations.

Regarding the tender made by Blochman and the Syndicate to the Trustee on May 3, 1913, plaintiff is not content to intersperse throughout its discussion further defamatory insinuations directed against the Trustee, but apparently, by shrewd methods of argument, attempts to erect a false premise upon which it builds a charge of direct misrepresentation on the part of the Trustee.

The facts are simple. The Trustee on May 2, 1913, had wired plaintiff of Blochman's expectation to pay on May 8th and requested authority to accept or refuse payment if made on or before that day. (Ex. 30, Tr., p. 479.) Before receiving an answer tender was made to it of the sum due (testimony of Taggart, Trustee's trust officer (Tr., pp. 366-367). Twenty minutes later (Taggart's testimony, Tr., p. 366, and Ex. 34, Tr., p. 483), the Trustee received plaintiff's reply by wire (Ex. 31, Tr., p. 479) informing of its election to declare all pay-

ments due. The tender was accompanied by a written statement upon which the Trustee endorsed its acknowledgment, doubtless at Blochman's request so that the latter might use it as evidence in a suit, if necessary, to compel the acceptance of the money (See Letter Trustee to plaintiff, Ex. 34, Tr., p. 484) and for no other purpose.

Plaintiff argues:

First: That it was not seasonably advised of the tender (Opening Brief, p. 12).

Second: That the tender was a sham (Opening Brief, pp. 13, 37).

Third: That the facts of the alleged conditions attached to the tender were suppressed by the Trustee (Opening Brief pp. 12, 15, 36).

These may be considered in the above order. In the first place the trustee was not the general agent or trustee of the plaintiff, and therefore not bound to give immediate notice of these dealings.

It might very well assume that the facts of the tender would be communicated to the Plaintiff by Blochman who certainly was more interested in the effect of it than any other local party. Furthermore, the telegram from the plaintiff to Trustee of May 3rd (Ex. 31, *supra)* referred to its letter of May 2nd (Ex. 29, Tr., p. 478), and this letter, in the ordinary course of events, would not have reached the trustee until the 6th or 7th. Was it not an act of propriety to await receipt of the additional information, and meanwhile to learn of Blochman's intentions, before definitely informing the plaintiff? Coupled with which fact is Mr. Taggart's uncontradicted testimony (Tr., p. 366) that he intended to ad-

vise plaintiff, but if he overlooked it, his omission was due to the press of business. Even the words of his letter of May 9th (Ex. 34, *supra*) "On the day that tender was made to us of $25,000 in gold coin and interest to date" are apt words of reference and imply prior knowledge of or notice to plaintiff, but plaintiff did not take the trouble to inquire further regarding the tender or the facts pertaining to it, or the knowledge thus implied, or the apparent omission in imparting the information. There is no evidence of wilful suppression of fact, or purpose to conceal.

Nor was the tender a sham. Mr. Taggart testified, *as plaintiff's witness,* (Tr., pp. 366, 367, 376) (and his testimony stands uncontradicted) that "Mr. Blochman and Mr. Porter *produced* the *money in gold coin.*" "The tender was made May 3rd. Mr. Blochman and Mr. Porter came into my office with two or more bags of gold and placed them on my desk and said 'We now tender you $25,000 in gold and accrued interest to date.'" And now comes plaintiff and attempts to discredit the testimony of its own witness, uncontradicted and unimpeached.

Finally plaintiff complains that the Trustee fraudulently suppressed from it, the facts regarding the so-called "conditions" of the tender. The very fact that plaintiff raises this point and urges it so strongly is a concession on its part that Blochman or the Syndicate was at the date of the tender, and by virtue of the tender, entitled to a deed for lots under the provisions of the contract.

So far as the Trustee was concerned, it was not bound and did not consider itself bound to see to the performance of Blochman's personal covenants. It was

obliged only to act with respect to such monies as Blochman offered it to apply on the purchase price. That plaintiff, until the commencement of this action, or the trial, was of the same opinion is evident from the fact that although plaintiff had knowledge as early as April 8, 1913, of the legal subdivision of the land, nevertheless, in its various letters to the Trustee prior to May 1, 1913, it mentioned only the payments falling due on the purchase price, and omitted to mention, in any particular, the collateral covenants of Blochman concerning expenditures in improving the land. The evidence is not at all clear as to what Blochman or the Syndicate intended by inserting in the written tender the words: "This payment to be received in full compliance of my obligations under the contract", and in this respect, from the standpoint of Blochman and the Syndicate, the record is absolutely silent. Nor from the standpoint of the Trustee can it be positively said that the Trustee construed the statement in any particular manner. The Trustee was amply justified, however, in determining, if it so did, that the obligations referred to were only the installments of principal and interest of the unpaid purchase price then due, and consequently that such statement was not a condition, or such a condition, of the tender as required notification to the plaintiff.

As to the demand for proper number of lots, and assuming for the purpose of argument, that the trustee should have notified plaintiff thereof, the fact still remains that, the tender being good, and being accompanied by the demand for lots, Blochman (or the Syndicate) was entitled to have the payment credited as a payment on account of releases, and therefore as entitl-

ing him (or it) to corresponding releases, and that being so by the explicit provisions of the trust agreement, the plaintiff could not claim injury if the releases had been made at the time of the tender; all of which being true, it follows that plaintiff, in order to recover on account of subsequent releases based on the tender, would have to prove intervening circumstances (prior to the date of actual release) of a nature tending to injure it, and this it has not done nor offered to do. It likewise follows from the same premises that if releases were available at the time the tender was made, they were likewise available, whenever, on account of the tender, plaintiff subsequently received and accepted the sum tendered; so that plaintiff, even had it been specifically advised of the demand for lots accompanying the tender, could have done nothing prior to the time it accepted the monies, to deprive the beneficiary of the right to the releases. Probably this explains plaintiff's failure to offer to prove intermediate injury, for being bound by its own contract to this inescapable conclusion, it could prove no damage.

If the Trustee erred at all in not going into detail regarding the tender, it was no more negligent than was plaintiff in failing to ask for further information. As above pointed out, the letter from the Trustee of May 9th (Ex. 34, *supra*) was written by Mr. Taggart with the thought in mind that he had previously notified plaintiff, and the language of his letter is apt to convey that impression. But plaintiff was not sufficiently interested to enquire concerning the apparent omission, or comment on the same, until the trial of this case. It did not answer the trustee's letter of May 9th or acknowledge receipt of it (although called to its attention in the

Trustee's letter of May 23, 1913,) (Ex. 40, Tr., p. 489) or ever mention, in any subsequent communication, that letter or any statement in it. Indeed, it absolutely ignored the letter. And in view of the fact that in the same mail it received a letter from Mr. Porter, Secretary of the La Binda Park Syndicate, likewise informing it of the tender and requesting further extensions of time, it is a fair inference that the extension granted by plaintiff's letter of May 24, 1913 (Ex. 41, Tr., p. 490), and subsequent extensions, were made upon the representations and request of Mr. Porter or the Syndicate and not the Trustee.

There is absolutely nothing in either the Trustee's letter of May 9th (Ex. 34 *supra*) or of May 23rd (Ex. 40, Tr., p. 489) which would lead to an inference that the Trustee deliberately, or wilfully, or at all, *suppressed* any facts concerning the tender. On the contrary, the letter of May 9th plainly states that the Trustee anticipated an action on the part of Blochman to compel the Trustee or the plaintiff to accept payment of the sums tendered, and that when the action should be brought, the Trustee would immediately notify plaintiff and act according to its wishes. This letter having been ignored by plaintiff, the Trustee again wrote the plaintiff on May 23rd (Ex. 40, *supra*) requesting advices from plaintiff as to its wishes in the matter, and with a commendable desire to adjust the difficulty in an amicable manner, stated its belief that it would be well to grant Blochman another opportunity, concluding with an expression of its desire, manifest throughout the entire correspondence, to conform to plaintiff's mandates, viz: "What we most desire is that you advise us what course to proceed at

this time in order that we may give these people a definite answer." This letter was also ignored, its receipt was not acknowledged, nor was any answer forthcoming. This fact strengthens and corroborates the conclusion that the plaintiff was placing no reliance on statements of the trustee but was acting solely on representations and requests of Blochman and his associates.

In respect of these matters it is to be observed that on page 15 of Opening Brief plaintiff argues that its waiver in letter of May 24, 1913 (Ex. 41, Tr., p. 490), was induced by the *"clear representation* of the Trustee that the amount of money overdue on the contract had been unconditionally tendered". This allegation is so false as to not merit attention except in so far as it again displays the efforts of plaintiff to malign the character of the Trustee without any foundation in fact; for in the letter of the Trustee concerning the tender there is nothing *clear* about the facts, and there is no *representation* whatsoever except as to the time the tender was made. In which connection plaintiff must stand convicted either of deliberate intent to deceive the court by shrewd distortion of sentence-structure, or of a woeful ignorance of rhetoric, such as is not elsewhere displayed in its argument, when on page 37 of its opening brief it cavils:

> "Plaintiff was also without knowledge that the representation by the Trustee, from which the only inference to be drawn was, that an unconditional tender of the overdue $25,000 and interest had been made May 3, 1913, was untrue."

This quotation, taken for what it is worth, exemplifies plaintiff's attempts to read into the Trustee's letter of May 9th positive statements that were not there, and

to deduce from that letter unwarranted inferences to be apparently deceptively phrased in a manner calculated to convey erroneous impressions to the Court.

Plaintiff also proceeds to frame more innuendoes against the Trustee upon the trustee's letter to it of May 23, 1913 (Ex. 40, Tr., p. 489), wherein appears the following:

> "We believe they are acting in good faith, and we think that they have the money, or did have the money, to proceed under the terms of the Trust Agreement." (See Opening Brief, pp. 14, 15, 37.)

If plaintiff had acted upon the above statement (and it did not, as we shall hereafter point out) nevertheless no basis for attack upon the integrity of the trustee could be found therein. The trustee made no unqualified statement regarding the tender or the ability of Blochman and his associates to pay. There is not one direct or positive statement or representation, except that the parties either had or had had the money, which fact plaintiff proved by its own witness (Testimony of Taggart, Tr., pp. 366-367). There is nothing in the letter which was not true, nor is there any indication, even in view of subsequent developments, that anything was suppressed.

And in any event the plaintiff could not have been misled thereby, for the letter crossed in the mails the plaintiff's waiver of existing defaults (Ex. 41, Tr., p. 490) by virtue of which the payment of $28,464.07 was made during the closing days of June. This fact plaintiff concedes (page 15, Opening Brief). Plaintiff also says, in the second paragraph on the same page, that its waiver was "thus induced" upon the clear representation of the Trustee that the amount of money overdue on the

contract had been unconditionally tendered. In the face of which assertion it is amazing to see plaintiff astride a horse of another color at the finish of this lap, for behold (pp. 36-37, Opening Brief) it (plaintiff) "received this money under the belief created by the statements of the Trustee that the La Binda Park Syndicate to which Blochman had assigned his interest was formed by 'responsible people', and was a company 'strong and active', and that it had the money to proceed under the terms of the trust," whereas, as we have shown, the Trustee's telegram concerning the new company did not link the organization with La Binda Park Syndicate, moreover, the plaintiff, after receiving the telegram elected to deal solely with Blochman at all times; nor did plaintiff receive the trustee's letter of May 23rd (Ex. 40, *supra*) stating that the purchasers had or had had the money to proceed under the terms of the trust, until several days after it had forwarded its letter of May 24th (Ex. 41, *supra*) waiving the defaults. Verily, consistency, thou are a jewel!

As to waivers of the plaintiff it may not be out of order here to observe that the letter and the telegram of the trustee to the plaintiff on June 30, 1913, are so worded (by chance and not purposely so on the part of the trustee) that the plaintiff might easily have and probably did infer that the monies were actually collected on June 30th. The payee was not then concerned, however, with two or three days lapse of time in payment. The sum remitted to it was large enough to permit it to overlook such a trifle and it was not until the trial of this action that plaintiff attempted to evade the effect of its waiver

in accepting the monies by a frantic endeavor to declare the monies overdue when paid.

The letter of August 15th, 1913, from the Trustee to plaintiff (Ex. 58, Tr., pp. 510-511) contains a harmless statement "They are preparing to put the property on the market in a short time" which plaintiff's brief (p. 18) cites as suppression of notice of acts of the Trustee concerning the property and as an inference that no disposition of the property had been made. The plaintiff had requested (Ex. 57, Tr., p. 509) the remittance of the item of interest which had been overlooked in the previous payment and had also called attention to the September interest payment, asking notification of the owners in due time so that the same could be met promptly. The reply of the trustee was that the Syndicate was preparing to put the property on the market in a short time and that while money was rather tight, it, the trustee, believed that the Syndicate would be able to arrange for the September interest payment. The facts are not questioned; the property had not theretofore been put on the market by the Syndicate, and it is not necessary that any property be put on the market in order to be sold. The sales to Haskins and Kibler were as valid as if the property had been sold in the open market. The plaintiff having requested the Trustee to notify the Syndicate of the payment coming due could assume nothing else than that the Trustee, in compliance with this request, had conferred with the Syndicate, had obtained this information, and that such information was not the information of the trustee but rather the representations and statements of the members of the Syndicate. The Trustee could not know that the property was being pre-

pared for the market unless so informed by the Syndicate, and therefore the trustee was only the medium of transmission of the words of the Syndicate to plaintiff.

With regard to the releases of lots, plaintiff charges that it was part of the duty of the Trustee to inform it when these were made, and that its failure to do so was a wilful and deliberate suppression of facts. It is to be noted, however, that the trustee was only concerned with one question, under the provisions of the trust agreement, that is, whether or not plaintiff would accept the money. Upon acceptance, the trustee, as it interpreted the contract, would be bound to make releases or deeds. The trustee supposed, and had a right to suppose, that plaintiff would be as fully advised on that subject as it was, for the terms of the contract on that subject were plain and unequivocal. Under the circumstances it would not only be unnecessary, but a reflection on the intelligence of the officers of plaintiff, to inform plaintiff each time a payment was made, that a certain number of lots were being released, according to the terms of the contract, by virtue of the payment.

The first inquiry from the plaintiff directed to the Trustee and requesting advice as to the Subdivision of land and sale of lots appears in the letter from Mr. Congdon, of Counsel of Plaintiff, of date December 19th, 1913. (Ex. 79, Tr., p. 535.) Mr. Congdon probably then read the correspondence and the contract together for the first time and discovered the fact that the plaintiff had been under a misapprehension concerning this particular provision, for he veils his letter in the following language:

"Have the lands been subdivided into lots as provided in the contract they may be and have any of the lots been sold on contract or otherwise?"

Recognizing the right of subdivision in the contract he inquires whether the lands have been subdivided *as provided in the contract they may be.* His language regarding the sale of lots is also significant, "and have any of the lots been sold on contract or otherwise". In response to this letter the trustee promptly replied (Ex. 81, Tr., p. 538) stating that a number of the lots had been released upon payment of the amount designated in the contract and that the amounts had been duly forwarded to his client. Subsequently it appears that Mr. Congdon and one of the officers of the plaintiff visited the office of the Trustee and demanded to know the names of the parties for whom the Trustee was then holding the lots so released and also the trusts upon which the same were held. (Tr., pp. 362, 363, 364, 423, 424.) The Trustee furnished to the demandants the numbers of lots released, identifying the same and also giving the date of release; as witness, the bill of complaint and amended bill of complaint herein. It properly refused to disclose the subsequent trusts, because it is by law prohibited from betraying its trusts. It kept these trusts inviolate until the time of the trial of this action, when it was given permission by its *cestui que trustent* to divulge the nature of the same. Believing that it had acted lawfully and according to its contract with the plaintiff at the time of its acts in releasing the property from the trust of the plaintiff it believed itself to be justified in creating new trusts and kept these trusts inviolate and the plaintiff was so informed, and the refusal

to give the information demanded of it by the plaintiff was based upon that ground. (Tr., pp. 424-425.)

Mr. Congdon testified (Tr., p. 363) that he did not know, on the occasion of this visit, that the Trustee had received $1000 a lot for each lot released, but that he knew it then (while testifying) *from the pleadings*. Also, "the first I knew that some of the last payments had been made up in that way was in a letter in the correspondence here; that Mr. Taggart as Trust Officer of the Trust Company wrote me in answer to an inquiry I made from the Trust Company, in which he stated that certain lots had been released and the money sent to us. This was before my visit and was one of the things that brought me out here". (See Ex. 81, Tr., p. 538.) From December 24, 1913, to March 16, 1914, is a long cry, and the contradictory testimony above shown is again illustrative of that astounding lack of consistency which plaintiff displays in attempting to fix the dates upon which it received knowledge of these various matters.

And in considering this particular charge against the Trustee the testimony of Mr. Springer (Tr., pp. 422, 423) must not be disregarded, for therein it is shown that in its hundreds of other trusts of the same nature, the trustee's right to release under similar circumstances had never been questioned, and in a few instances only had any beneficiary situated as was plaintiff, requested any information concerning releases and then only for the purpose of keeping posted on the identity of the property released so as to know what remained as security.

If the plaintiff did not obtain any knowledge of the fact of the releases, then such lack of knowledge arose not

from the deliberate or wilful or any misrepresentation or suppression of facts on the part of the Trustee, but rather, as is clearly indicated by the pleadings and evidence in this case, from the difference in the construction of the contract by the Trustee and the Plaintiff, or their respective counsel (Tr., pp. 356, 364, 402, 424), or from its negligent failure to make proper inquiries. Again, if the Trustee was correct and is correct in its construction of the contract, as we contend, then as a necessary incident to the payment of money by Blochman, or his assigns, lots would be released to his or their order, to all of which the plaintiff would be advised by the express terms of the contract itself; and there could be no doubt as to the number of lots to be released in each instance, except as to whether the lots be corner lots or inside lots. It was therefore incumbent upon the plaintiff, if it so desired, upon payment to it of the sums received by it from the Trustee, to inquire of the Trustee, not whether it had released lots, but what lots had been released and its failure to so do is either attributable to its negligence or its mistake in construing the contract.

Before concluding the general discussion of the relations between plaintiff and trustee, it will not be out of order to call attention to the fact that plaintiff itself was not infallible with regard to the matters relating to collection of the unpaid purchase price, as witness its letter of July 21, 1913, to the trustee (Ex. 54, Tr., p. 506), wherein it acknowledges the error of omission in interest in its statement of May 24th (Ex. 41, *supra*), and also reference may be made to its letter to the Trustee of April 28, 1913 (Ex. 23, Tr., p. 474), ordering the Trus-

tee to deposit all monies received for its account in the Bank of California, National Association (at San Francisco); the letter of the trustee of date June 30, 1913 (Ex. 50, Tr., p. 502), wherein the trustee advises plaintiff that it has made the deposit in that Bank, according to directions; also to the provisions of the Trust Agreement requiring payment of all sums at the office of the Trustee in San Diego, and finally the letter of the plaintiff to the trustee, of date October 21, 1913 (Ex. 65, Tr., pp. 517-518), calling the trustee's attention to the fact that plaintiff was charged exchange of $28.46, on account of its remittance, from the Bank of California, also exchange on the interest payment made in October, 1913, amounting to $4.05, and demanding that the trustee remit a Chicago draft to cover these exchange charges: again illustrative of the attempt of plaintiff to penalize the trustee for following plaintiff's instructions.

And, although plaintiff is quick to charge the trustee with such alleged wilful violation of the trust, it is likewise quick to forget the numerous services rendered it by the Trustee in complying with plaintiff's requests to notify the beneficiaries of the dates of maturities of the several installments of principal and interest, of its services (entirely uncalled for by the trust and not within its duties thereunder) in dunning the beneficiaries from day to day for the unpaid installments, in serving upon the officers of the Syndicate and Blochman the various notices to pay up and of elections to declare the whole indebtedness due, of making the affidavits of service and of returning the same without delay to plaintiff; and of the voluntary act of the Trustee in informing plaintiff of the delinquency in the taxes on the property (although, by

the terms of the trust, it had no duties relative thereto), and in the same connection advancing the large sum necessary to pay the tax so as to save the plaintiff penalties which otherwise would have accrued (Ex. 83, Tr., p. 541, Ex. 87, Tr., p. 544) and of the various and sundry matters connected with the trust which show an extraordinary effort on the part of the Trustee to not only comply with the terms of the trust but to serve the plaintiff in every way possible by the performance of services not provided for or contemplated therein, and *all of this, without compensation or expectation of compensation.*

Facts Pertaining to the Various Series of Releases

It is desired here to briefly discuss the series of releases made by the trustee on June 28, 1913, (Opening Brief, pp. 23-24) and the release on October 10, 1913, (Steketee Transaction, Opening Brief, p. 38.) Plaintiff, however, has discussed these matters as if the trustee had knowledge or was chargeable with knowledge of all the facts developed at the trial of the case relative to the internal affairs of the La Binda Park Syndicate and the dealings in stock of that corporation connected with the disposition of lots. It will, therefore, be difficult to properly treat of this feature of the case without repeating some of the facts set forth in the Opening Brief. Adopting the designation of the series of releases in the Opening Brief, we are led to consider first:

Alpha of the Series
(Opening Brief, p. 26)

This is the transaction by which Blochman obtained a release of ten lots and thereupon the La Binda Park Syndicate hypothecated the same to the United States

National Bank by a new deed of trust in which the Trust Company was made the trustee, with power of sale upon foreclosure.

The only objection taken by the plaintiff to this transaction is that it constituted no sale, a matter of which we shall hereafter speak.

In a later treatment of this same transaction (Opening Brief, pp. 77 to 81) Plaintiff admits (page 81) that "it had no concern with the question where or how Blochman obtained the money." If that be the case we fail to see any force in the objection.

Beta and Gamma of the Series
(Opening Brief, p. 27)

So far as Trustee is concerned, Louise R. Kibler purchased Lots "L", "O" and "P" in Block 5 (Ex. 103, Tr., p. 571) and Charles Kibler purchased Lots "C" and "E" in Block 5 (Ex. 92, Tr., pp. 553-554). In this Exhibit 92 there is also included an order on the trustee to place Lots "G", "I" and "K" at the disposition of Charles Kibler and there is an endorsement on the back wherein it appears that upon payment of a loan by the United States National Bank to Kibler these Lots "G", "I" and "K" were to be reconveyed to the La Binda Park Syndicate. Kibler being unable to pay the loan himself negotiated other loans in substitution thereof and his acts in that regard were duly ratified at a meeting of the Directors of the La Binda Park Syndicate on March 19, 1915 (Tr., pp. 394-5-6-7-8).

As to the five lots claimed by the Kiblers, namely: Lots "L", "O" and "P" in Block 5 and Lots "C" and "E" in Block 5, it cannot be denied that on the face of these

transactions they were sales for a consideration of $1000. per lot. That Kiblers, by their immediate hypothecations of these lots, together with additional security, were able to obtain the purchase price from the two Banks is immaterial, for the fact remains that the money was paid and that to all intents and purposes the deeds were made.

As to Lots "G", "I" and "K", these lots were included in the same order for conveyance to Kibler as were Lots "C" and "E" and there was nothing in the order for the conveyance to advise the trustee that the transaction was not a sale as to these three lots. For aught that the Trustee may have known, Kibler may have purchased these lots from the Syndicate and may either have paid the Syndicate the $3000.00, which the plaintiff received as its release price, or may have borrowed the money from the Syndicate to pay for the lots. The only evidence binding the trustee to knowledge of these transactions is in the evidence of Mr. Springer (Tr., pp. 418-419) to the effect that there was nothing to base the facts on, regarding the lending of these three lots to Kibler, other than the Resolutions of the La Binda Park Syndicate (*supra*) adopted almost two years later, also that the witness gathered the facts from that resolution and from conversations had with the parties, and that the witness's personal knowledge, outside of the facts ascertained from the trustee's books, began in November, 1913 (Tr., pp. 422-427), many months after the transaction.

The testimony of Mr. Kibler (Tr., pp. 434-435) is consistent with the Resolution of the Directors of La Binda Park Syndicate, above mentioned, but still does not imply that the trustee had knowledge of the lending

of these three lots at the time of the release; furthermore, Mr. Kibler's testimony is to the effect that the property was purchased by and the equitable title now vested in his wife, Louise R. Kibler, as to the five remaining lots, namely: Lots "C", "E", "L", "O" and "P" in Block 5.

Regardless of all other matters, it is apparent that as to Lots "I" and "K" there are now outstanding declarations of trust by the trustee showing absolute resulting trusts in favor of Minnie E. Fugate (Ex. 101 and 97, *supra*); like absolute resulting trusts on Lots "C", "E" and "G" in favor of W. R. Rogers (Ex. 95, *supra*) and that Lots "L", "O" and "P" were ordered by Blochman and the Syndicate to be conveyed to Louise R. Kibler (Ex. 103, *supra*) and that nothing thereafter transpired respecting these three lots except hypothecations; and that Minnie E. Fugate, W. R. Rogers and Louise R. Kibler (and her mortgagee, the Blochman Commercial and Savings Bank) are not parties to this action and were not made parties even after the trial of the action in March, 1915, when plaintiff obtained complete knowledge of these transactions, although it had ample time so to do before the judgment of the trial court rendered June 16, 1916 (Tr., p. 298). It is inconceivable that a Court of Equity would attempt to adjudicate the rights of these parties, apparent absolute owners of equitable or legal interests in the properties, without giving them an opportunity to be heard.

And it also remains true that no part of the evidence in this case charges the trustee with notice of the dealings in stock of the La Binda Park Syndicate or even with knowledge that the Kiblers, or either of them, were at any time purchasers or holders of stock.

Delta Order of the Series

(Opening Brief, page 33.)

This comprises the transaction whereby R. W. Haskins purchased five lots, namely: Lots "B", "D", "F", "H" and "J" in Block 5, paying to the Syndicate $5000.00 by check, which it endorsed to the trustee. There is not one scintilla of evidence binding the trustee to any notice of the stock transactions between Haskins and the Syndicate and on the face of the order for the deed (Ex. 102, Tr., p. 570) it must be apparent to one having no other knowledge that a sale and conveyance were implied.

All the testimony regarding this transaction (Taggart, Tr., pp. 370-371; Porter, Tr., pp. 403-404; Haskins, Tr., pp. 406-407; Kibler, Tr., pp. 435-436; Springer, Tr., pp. 414-415) conclusively establish the fact that an absolute sale took place in this instance. As Mr. Porter expressed it (Tr., p. 404), "as far as Mr. Haskins was concerned, there was no condition as to the transfer of the conveyance to him".

The Steketee Transaction

(Opening Brief, p. 38.)

The facts pertaining to this transaction are substantially as stated in plaintiff's Opening Brief, but it is noteworthy here that neither Steketee nor his assignee, C. W. Fox, are parties to this action, notwithstanding that plaintiff had complete knowledge of the facts pertaining to the creation of their interests in the property at the time of the trial of the action in March, 1915, and did not attempt to amend its bill of complaint to include any matters arising out of the transaction or to make these persons parties to the action, notwithstanding that a year

and three months elapsed before the decree of the Court and notwithstanding that subsequent pleadings were filed and subsequent matters of evidence introduced at the session of the Court in March, 1916.

The Map of La Binda Park

(Opening Brief, p. 40.)

As we have heretofore pointed out, plaintiff had full knowledge of the subdivision of the land and the recording of the map on April 8, 1913, at the time it acknowledged receipt of the letter from Blochman of date April 4, 1913 (Ex. 10-12, *supra*). Notwithstanding which it made no effort to discover what manner of subdivision had been made or anything pertaining to the improvements to and upon the property. Although conceding that no discretionary power respecting the signing of the map was vested in the trustee, yet plaintiff contends that the trustee was guilty of abuse of the confidence vested in it in that matter.

But recurring to the Trust Agreement, it will be obvious that the trustee was not merely authorized to sign the plat but was *directed to do so*. "Directed" here means required, commanded to sign the map when "presented" to it.

Whitfield vs. *Thompson,* 38 So., 113;
Thissell vs. *Schillinger,* 71 N. E., 300;
Garden Com'rs vs. *Wistar,* 18 Pa. 6 Harris, 195;
Collister vs. *Fassitt,* 39 N. Y. Supp., 800.

The trustee had no discretion in the matter of executing a plat of the ground except to see that, as subdivided, there were at least two hundred fifty lots having a street frontage provided for in the Trust Agreement. Nothing

can be plainer than that it was the imperative duty of the trustee to sign and acknowledge such plat, otherwise conforming to the size and number of lots as should be presented to it for signature by the beneficiary, and all the imputations in plaintiff's brief that trustee had any discretion in the matter or that it was expected not to abuse a confidence of which it had no notice, or pertaining to which it had received no instructions from the plaintiff, are without support. If the plaintiff had intended or desired that the trustee exercise any discretion or otherwise conform to the ideas of plaintiff regarding the manner of subdivision, so as to vest it with any right to use its judgment as to the wisdom or feasibility of platting, it should have provided therefore in the Trust Agreement or otherwise instructed the trustee, and not unequivocally directed the trustee to sign and acknowledge as proprietor such map or plat as the beneficiary should present to it for signature. Nor is there any time limit for the signature of the trustee on the map or the recording of the map. The only provision in the Trust Agreement by which the platting is in any way related to time is the personal covenant of Blochman that he would expend $25,000.00 in the doing of various things, included within which were matters, preliminary and otherwise, pertaining to the subdivision of the land. The plaintiff clearly conferred upon Blochman, or his assigns, the right to subdivide and plat the land as he or they saw fit so long as at least two hundred fifty lots of the specified dimensions were included in the subdivision. Neither is it at all difficult to understand why the plaintiff, at the time of making the contract and until the fertile imagination of counsel had offered suggestions

in the matter, rested content to leave the matter of the subdivision, subject to the above mentioned limitations, entirely in the hands of Blochman, or his assigns. The plaintiff was absolutely protected by the number of lots in which the tract was required to be divided, and it could not stand to lose anything by a sale or release of any one or a number of such lots on account of the exorbitant release price required to be paid to trustee for its account before the breaking up of the tract.

No elaboration of the subject appears necessary, for plaintiff, after its numerous veiled charges against the trustee for abuse of confidence and discretion, etc., in the matter of subdivision, concludes that, after all, it has no foundation for its plaint, and that Blochman is the one solely liable for this abuse, for in the second paragraph, on page 57, of its Opening Brief, it argues: "It will be observed that the plaintiff, by the terms of the contract, yielded to the *beneficiary* the important concession * * * of the power to indicate the plan of subdivision * * * * the scheme and plan of subdivision was left to the *arbitrary will of Blochman"*; and, in the third paragraph, on the same page: "it (the stipulation), was the consideration to plaintiff for entrusting the plan of subdivision and the involved dedication of streets and alleys and public places to the *exclusive control of Blochman"*.

Finally, the map does not violate the City Ordinance, as plaintiff contends (Opening Brief, page 41) for Section 15 of the Ordinance does not establish certain widths of streets, except when "deemed necessary by the Common Council", and Section 16 of the Ordinance does not require streets to be continuations of existing highways in adjoining or contiguous subdivisions in cases "where

the extension of the highways in two or more existing subdivisions will not permit of the proper subdivision of the land", but, in those cases, "the Common Council, in conference with the owner or owners, shall determine which highways shall and which shall not be extended."

II.

CONSTRUCTION OF THE CONTRACT.

A. Nature of the Instrument.

The Trust Agreement between Blochman, the trustee and the plaintiff constituted a simple deed of trust to secure an indebtedness from Blochman to the plaintiff. The facts are that Blochman purchased the property from the plaintiff and, desiring to save recording fees and at the same time avail himself of the benefits to be derived from the privacy of a Declaration of Trust as against a trust disclosed by the record, arranged with the plaintiff for a conveyance direct to the trustee and the creation of such deed of trust by the agreement securing the unpaid purchase price to plaintiff. Such a transaction constitutes a simple deed of trust under the California Law. (*Younger* vs. *Moore,* 155 Cal., 767).

Such an instrument differs essentially from a mortgage and plaintiff cannot enforce its rights under the instrument by a proceeding in foreclosure as a mortgage. This doctrine is laid down in the following cases:

Koch vs. *Briggs,* 14 Cal., 257;
Comerais vs. *Genella,* 22 Cal., 116;
Grant vs. *Burr,* 54 Cal., 298;
Bateman vs. *Burr,* 57 Cal., 480;
Savings & Loan Society vs. *Burnett,* 106 Cal., 514;
Banta vs. *Wise,* 135 Cal., 277;

Herbert Kraft Co. vs. *Bryan,* 140 Cal., 73;
Travelli vs. *Bowman,* 150 Cal., 587;
Younger vs. *Moore,* 155 Cal., 767;
Sacramento Bank vs. *Alcorn,* 121 Cal., 379.

Section 863, of the Civil Code of California, reads as follows:

> "Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property but may enforce the performance of the trust."

Construing this section, the Supreme Court of California has uniformly held that the entire estate passes to the trustee of an express trust and that the beneficiary of the trust must pursue the remedies provided by law and the trust indenture to enforce it.

Noble vs. *Learned,* 153 Cal., 245;
Weber vs. *McCleverty,* 149 Cal., 316;
C. A. Warren Co. vs. *All Persons,* 153 Cal., 774;
Roberts vs. *True,* 7 Cal. App., 379;
Estate of Spreckels, 162 Cal., 575.

Where property is conveyed to a trustee to secure the payment of an indebtedness, or any sum of money, with a power of sale in the event of a default and especially where full provisions for sale by the trustee are made in the conveyance or instruments creating the trust, it has been uniformly held by the Supreme Court of California, in the long series of opinions from 1859 to the present time, that there can be no foreclosure by a proceeding in Court and that the obligations must be enforced in ac-

cordance with the provisions of the instrument. These decisions appear in the above list of cases commencing with *Koch* vs. *Briggs*. The rule stated in these cases has been the law of the State so long that if it is to be changed the change should be made only by the Legislature. Hence we say that this action should fail in all other respects than as a direction to the trustee to complete the performance of the trust, as it stands willing to do, and that the plaintiff be left to the remedy prescribed by the Trust Agreement. Plaintiff has a plain, speedy and adequate remedy at law and, other than to enforce performance of the trust, has no right to invoke the aid of equity. If the trustee for any reason had been disqualified from acting further in the matter, the provisions of Sections 2282 and 2283 of the Civil Code of California afforded to the plaintiff a full and complete remedy, by removal of the trustee.

B. The Authority of the Trustee to Make Releases

Concerning the authority of the Trustee to make releases of the property from plaintiff's lien under the Trust Agreement, it is proposed to follow plaintiff's order of discussion as closely as consistently permissible, but since the order cannot be followed in its entirety the discussion herein will be confined to the following contentions in the order of their number:

First: The release clauses in the Trust Agreement were not executory.

Second: The matter of subdivision was mandatory.

Third: Releases were not limited to sales.

Fourth: Releases were available on interest payments.

Fifth: Releases are supported by judicial precedents.

Sixth: Time was not made of the essence of the contract as regards the right to release.

Seventh: Any uncertainty in the release provisions must be construed against plaintiff.

Eighth: The trustee is protected by general rules of law and equity.

The discussion follows:

1. The Release Clauses in the Trust Agreement Were Not Executory.

Plaintiff argues that the covenant on its part by which the trustee was authorized and directed to execute deeds on the order of Blochman, or his assigns, was wholly executory and was conditioned upon performance by Blochman of three certain covenants; the first, to expend $25,000.00 in the subdivision, laying out, platting and preparation for sale of the tract on or before March 1, 1913, if he should elect to subdivide; the second, to pay installments of principal and interest on their respective dates of maturity, and the third, to pay all taxes and assessments before delinquency; and various authorities are cited by plaintiff in support of its contention that releases could not be made while any default existed. These cases will be distinguished in the fifth subdivision in this argument. It will there be seen that they have little, if any, applicability to the particular question in hand, for this discussion concerns not the right to release when a condition precedent exists, but on the contrary, whether or not the condition does exist.

Consulting the Trust Agreement, it will be manifest that the trustee had nothing to do with the expenditure

of any part of the $25,000.00, nor was it required to see that that sum was expended before March 1, 1913. It was required to sign the map when "presented to it for signature by the beneficiary" whether the map was presented to it before or after March 1, 1913. The covenant to make the expenditure did not concern the trustee in any manner whatsoever nor impose upon it a duty to inquire as to the amount or time of such expenditure. It might be called upon and required to sign the map long before $25,000 had been thus expended. In fact all that was required in order to prepare the map and make it complete and ready for signature by the trustee was a survey of the land. If the phrase "preparation for sale" means what plaintiff contends it does, viz: the grading of streets, constructing of sidewalks, curbs, gutters and like work, then there could be no "preparation for sale of the land" until the tract was platted into lots, blocks and streets, the plat accepted by the City and executed by the trustee "as proprietor". The acceptance, signing and execution of the plat had to be done before the beneficiary could lawfully make that "preparation for sale" or expend any money in such preparation or at least in that part of the "preparation for sale" which is included in this street work.

There is no requirement that $25,000.00 be expended before the lots could be sold. It is provided that "when so subdivided" the land may be sold upon the payment to the trustee of $1000.00 per lot for inside lots and $1200.00 for corner lots described "in the subdivision or plat". There is no connection between the clause giving the beneficiary authority to sell or the trustee

power to make deeds and the clause requiring the expenditure of $25,000.00 in the various matters relating to the platting, subdivision and preparation for sale of the tract.

> "Where a bond for the conveyance of land, after reciting the conditions upon which the conveyance is to be made, stipulated that the obligee should pay all taxes upon the land, the payment of taxes was not a condition precedent to the release."
>
> *Russell* vs. *Copeland,* 30 Me. (17 Shep.) 332.

The contract expressly provides that "when so subdivided said real property may be sold by the beneficiary upon the payment to the trustee for the benefit of said payee of a sum equal to $1000.00 for each and every inside lot and $1200.00 for each and every corner lot described in said subdivision or plat." And the trustee was required to pay said sums to the plaintiff and was required to execute a deed to any lot whenever there should be paid to it these sums. Here is nothing said about preparation of the land for sale or expenditure of $25,000.00 in preparation for sale; nothing about the trustee being chargeable with notice or knowledge of the expenditure of money in preparing the land for sale before it, the trustee, could make deeds. The language is that when so subdivided said real property may be sold, not when $25,000.00 is expended in preparing it for sale, not when subdivided *and that sum expended.* And when the tract was subdivided any lot in it might be sold.

Plaintiff evidently assumes the words "so subdivided" to include all the matters relating to the preparation of the property for sale purposes. Recurring again to the

Trust Agreement, it will be seen that the property may be *subdivided* into smaller tracts etc. or *subdivisions;* that the signature of the trustee on the map or plat of said *subdivision* shall bind the parties; the trustee is directed to sign the map or plat *subdividing* the land; the land when *subdivided* shall contain certain lots of specified size and that the beneficiary will expend a certain sum in the *subdivision* and other specified matters; that the costs and expenses of the *subdivision* and all other specified matters shall be borne by the beneficiary; that when so *subdivided* the property may be sold upon payment of certain sums per lot for each lot in said *subdivision* or plat. It is obvious that the word "subdivided" is given but one meaning in the contract and that is, the execution and recording of a map dividing the property into smaller tracts, and that the right to releases accrued when this map had been filed.

> "Other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another part."
>
> *Saunders* vs. *Clark,* 29 Cal., 299;
>
> *Pringle* vs. *Wilson,* 156 Cal., 313.

The only default on the part of Blochman which might deprive him of the right to releases was his failure to pay to the plaintiff amounts which it may have paid out for taxes or assessments upon the property after delinquency. It is provided in the agreement that if the beneficiary failed to pay the taxes and assessments that should become payable, the plaintiff might pay the same and the amounts paid by the latter should bear interest and constitute additional indebtedness and be paid by

Blochman before he should be entitled to have any more deeds from the trustee. *Here is a plain provision and the only one mentioned in the contract which forbade the release of any lot by the trustee for any default on the part of Blochman, and no other default on his part operated to prevent his demanding or receiving releases or deeds when he paid the stipulated amounts per lot.* Under familiar rules of construction it is submitted that the Court must hold that as the parties provided that this particular default should deprive the beneficiary of a right to release and made no mention of any other default which would preclude him from demanding a release, that his failure to meet payments of the purchase price or expend the necessary amount in preparing the land for sale would not justify the trustee in refusing to comply with his demand for deeds when he had paid the amount per lot for the lots sought to be released. If the parties had contemplated that any default other than that in repaying the plaintiff the amount expended by it for taxes and assessments should deprive Blochman of his right to deeds, they undoubtedly would have incorporated a provision to that effect in the contract. Having named the only instance in which a default would work a suspension (not a forfeiture as claimed) of the right to releases, it can be presumed that the parties did not intend that any other default would have such effect. The parties having, by the express terms of the contract, forbidden the trustee to make deeds upon this sole condition as to repayment of expenditures for taxes and assessments and having mentioned no other incident or case or default which should deprive, for the time being, or otherwise, the beneficiary of his right to deeds upon

paying the stipulated sums therefor, it follows that it was the duty of the trustee to make the deeds or releases called for when the payments were made to it.

2. The Matter of Subdivision Was Mandatory.

Plaintiff argues that there was no obligation on Blochman to subdivide and that his covenants to make the $25,000.00 expenditure became effective only upon his election to subdivide. But when the agreement was made it appears to have been the intention of the vendor and vendee to have the land subdivided, and it is clear that they both expected that this would be done and that it would have to be done in order to make the property marketable and to enable Blochman to dispose of it. There is no reason for believing that they expected him to pay the entire purchase price before a subdivision was made. Plaintiff was a business corporation, managed by experienced business men, agreeing, in this instance, to sell the land to a man likewise experienced in business affairs, the terms of payment being drawn out over a period of two years and otherwise providing for the breaking up of the tract into smaller subdivisions. It is the common experience of men dealing in tracts of land of this size, costing as much as this did, that the buyer subdivides such tracts and disposes of them in smaller parcels or lots and he is uniformly expected so to do. It would be unreasonable to attribute to these parties the intention that the lands should be held as a whole until paid for. This intention to subdivide is also apparent from the provisions of the agreement; they prescribed with particularity the number of lots into which the tract should be subdivided and the size of such

lots and the release price to be paid for them, inside and corner lots, and the disposition of the monies to be paid in effecting such releases. In addition to these provisions the contract expressly provides "that the beneficiary *will expend* in the subdivision, laying out, platting and preparation for sale of said real property, at least the sum of $25,000.00 on or before the first day of March 1913". Here is an express agreement to expend a large sum of money upon and in connection with the property. It is not dependent upon any clause preceding it; had the parties intended that it should be and that unless there was a subdivision no expenditure need be made in preparing the property for sale it would have been very easy for them to have expressed such intention and it must be presumed that they would have done so. Plaintiff at the time it made the agreement wanted the property subdivided and the $25,000.00 expended in preparing the property for sale. The plaintiff put a release price upon the property that amply secured it in the payment of the balance of the purchase money, if the land should be sold in smaller subdivisions. It provided for a sufficient number of lots to pay the entire purchase price and interest and leave about one hundred such lots undisposed of so that if it should be called upon to take any of the property back it would run no risk of a loss. The plaintiff, notwithstanding advices received by it in the letter from Blochman of date April 4, 1913 (Ex. 10, *supra*) that the land had been subdivided and some of the lots had been sold, seems to have lost interest in the matter of the subdivision and preparation for sale until Mr. Congdon's letter of December 19, 1913 (Ex. 79, *supra*), wherein the latter writes "have the lands

been subdivided into lots as provided in the contract they may be and have any of the lots been sold on contract or otherwise?" and in Mr. Congdon's letter to the trustee dated January 5, 1914 (Ex. 82, Tr., p. 540), he does not make any question or objection relative to the subdivision or the failure to make the expenditures, the only thing that "surprised" him was that some of the lots had been released. The conduct of the plaintiff in regard to the provisions of the contract relating to these matters warranted the Court in finding that plaintiff is estopped from making any objections to the subdivision of the land or to the fact that the subdivision was not completed before March 1, 1913, or to the fact that the stipulated amount was not expended before that date. The plaintiff may have been so anxious to get the $25,000 installment that fell due May 1, 1913, and the interest thereon and the interest on interest that it was willing to remain silent for the time being regarding the subdivision and preparation for sale.

The most that could reasonably claimed on behalf of plaintiff in this matter is that these provisions are uncertain. As we shall have occasion hereafter to point out, if any uncertainty exists the contract is to be construed most strongly against the plaintiff, who prepared it.

Plaintiff contends that the Trust Agreement constitutes something in the nature of an equitable mortgage in its favor or a vendor's lien, and seeks foreclosure on that basis. In *Womble* vs. *Womble,* 14 Cal. App., 739, the Court had under consideration personal covenants, collateral to a conveyance of land, and held that the consideration could not be extended to cover such collateral

obligations or duties, and that where the agreement was complicated and the vendee covenanted to do other things besides pay the purchase price, as to build a house on the land and the like, and the sum total of all his promises represents the consideration for the conveyance, there is a confusion so that it is difficult to separate the purchase money and the lien will not exist. If it shall be held that it was mandatory upon Blochman to subdivide by virtue of his covenants, then that case is authority for holding that plaintiff cannot insist on its lien covering Blochman's collateral obligations.

3. Releases Were Not Limited to Sales.

First Point: *The payment to the Trustee of the release price and the consequent release was a condition precedent to the sale of any lot or lots.*

Observe carefully the language used in the Trust Agreement: "It is further agreed that when so subdivided said real property may be sold by the beneficiary hereunder, or his assigns, *upon* payment to said trustee for the benefit of said payee a sum equal to $1000.00 for each and every inside lot and $1200.00 for each and every corner lot," etc.

The plaintiff argues that there is a condition attached to this release provision and that that condition is such as to require a sale of any lot or lots before a release may be obtained. We concede that there is a condition attached to this provision but maintain that the condition is exactly the reverse of that contended for by plaintiff. The provision is that the property *may* be sold by the beneficiary *upon payment* of the release price. The Trust Agreement does not state, as urged by plaintiff,

that the release price may be paid (and the lot released) upon a sale being made. Literally the provision can be construed only to mean that the beneficiary may sell, has the permission of the plaintiff to sell (and it is not mandatory upon him to so do), only upon the payment of such sum as will release the lot from the lien reserved to plaintiff by the Trust Instrument. The word "upon" as used in this provision is capable of one construction only and that is "on condition". This provision in no wise requires that a sale be made at any time, but on the contrary it absolutely prohibits the beneficiary from consummating any sale while the lot or lots intended to be sold remain subject to plaintiff's lien or right. In order that plaintiff's argument should be of any force whatever, it must be made to appear that the Trust Agreement expressly made a sale a condition precedent to a release. If such was its intention then the Trust Indenture should have read somewhat as follows:

> "It is further agreed that payment to the said trustee for the benefit of said payee of a sum equal to $1000.00 for each and every inside lot and $1200.00 for each and every corner lot described in said subdivision or plat may be made upon a sale having been made of the lot or lots to which the payments are made to apply and thereupon the trustee is authorized and directed to execute deeds," etc.

Instead of so wording the trust agreement plaintiff itself so framed it that the condition is, as we have pointed out, exactly the reverse of that now claimed for it by plaintiff.

There is a reason for all of this, plainly evident on a reading of the Trust Agreement. The beneficiary was desirous of having the privilege of sale and partial releases of the lots. The plaintiff consented to the release provisions but never consented that there should be a sale *out of the trust itself,* hence the peculiar language "that when so subdivided the said real property may be sold by the *beneficiary* hereunder, or his assigns". The plaintiff would not authorize the trustee to make a sale, for the effect of such a provision would have been to bind the plaintiff to any sale made by the trustee. The consent and permission of the plaintiff to sales was therefore given only upon the stipulation that the property to be sold be first released from the trust lien by payment of more than twice its proportionate share of the purchase price. And the lot or lots having thus been released, the beneficiary could sell or dispose of the property as he pleased. Sale by the beneficiary, or his assigns, certainly implies a precedent release from the lien of plaintiff, otherwise such sale would require the consent or action of the trustee and the plaintiff, after the payment of the $1000. release price, and no provision is contained in the Trust Agreement for any consent or action of the trustee or plaintiff nor is any contemplated.

That we are correct in our conclusions is evidenced from the wording of the sentence in the trust agreement following that first above quoted: "and said payee does hereby authorize and direct the said trustee to execute deeds on any lot or lots to the order of the beneficiary herein, or his assigns *whenever* there *shall have been paid* to said trustee for the account of said payee the

sum per lot as hereinbefore stated." Plainly, there is only one condition attached to a conveyance by the trustee, and that is the payment to it of the release price, for there is no condition, either in the sentence last above quoted, or elsewhere in the Trust Agreement, which requires a sale before a conveyance *to the beneficiary* or *its order;* in fact, the condition is that no sale may be made until a conveyance is available to the beneficiary by the payment of the release price.

It follows, therefore, that the lots hypothecated by the La Binda Park Syndicate or Blochman are as effectually released from plaintiff's lien and as validly released now as they ever can be or could have been, and that standing upon the literal construction of the contract *now "may be sold"* by Blochman or his assigns (and for that matter may already be sold, although that no longer concerns plaintiff or trustee) for Blochman, or his assigns, obtained this right to sell the property *"upon payment"* to the trustee for the benefit of plaintiff of a sum equal to $1000. for each lot.

Second Point: *The two release clauses are distinct, detached and separable and the second release clause authorizes a conveyance to the beneficiary, or his order, whether a sale has been made or not.*

The trustee has nothing to do with the provisions of the first sentence of the release paragraph except to receive the monies and transmit them to the plaintiff so soon as received in full and without any reduction or any cost or expense whatever to the payee (plaintiff). Its whole duty under this first sentence concerns only the receipt and transmission of monies. The remaining provisions of that sentence relate only to the beneficiary

and do not concern the trustee. The beneficiary asks for permission to sell the property. The plaintiff says "you may sell the property when you pay our agent (the trustee) the release price and not otherwise". What, therefore, has the trustee to do with the sale of the land or for that matter the plaintiff? The duties, obligations and rights or each are fulfilled and completed when the payment of the release price has been made and the property released from plaintiff's lien. Then, and then only; does the right of the beneficiary to sell the property accrue. He may go forth in the highways and byways heralding the fact that he has a lot or lots for sale, and may sell for any price or upon any terms and conditions satisfactory to him alone. Is there any condition in the Trust Agreement that the trustee shall not make a deed to the order of the beneficiary until after having released the property by the payment of the money the beneficiary must further make a sale of the lot so released? None whatever. The plaintiff has absolutely no concern with the disposition of the property after the release price has been paid and after the property has been released from plaintiff's lien, and it therefore authorizes, and indeed directs, the trustee to execute deeds on any lot or lots to the order of the beneficiary whenever there shall have been paid to the trustee for its account the stipulated release price.

Assuming, however, for the purpose of argument that these two sentences relating to the releases must be construed together, how will this vary the duties of the trustee? The first sentence concerns disposition of the property by the beneficiary; the second concerns disposition of the property by the trustee. The trustee finds

its only direction for the disposition of the property in the second sentence wherein it is authorized and even commanded to execute deeds to the order of the beneficiary upon the sole condition that the release price shall be paid. There is no prohibition against the conveyance to the beneficiary himself, or to his assigns. The deeds are to be made to the order of the beneficiary, or his assigns. The beneficiary may order a conveyance to himself or itself.

Viewed in this light there was nothing irregular in the case of the lots hypothecated for loans. The beneficiary, (La Binda Park Syndicate, assignee of Blochman) having first fulfilled the condition of the contract by the payment of the release price, orders a conveyance to itself; the trustee is required by the Trust Agreement to execute deeds to the order of the beneficiary, or his assigns, and therefore is bound to recognize this order of the beneficiary for the deed to itself. The conveyance thus having been duly made the beneficiary reconveys the property to the trustee upon another trust, not subject to the first (for the property has been released from the first trust and no longer is connected therewith), this second trust being to secure another indebtedness to a third party. But the facts show that the subsequent trusts were issued without actual conveyances having been made. The making of such conveyances would have been an idle act. That would have required the execution and recording of two deeds serving no purpose whatsoever except to revest the title of record in the name of the trustee.

"The law neither does nor requires idle acts."
Section 3532, *Civil Code of California.*

"That which ought to have been done is to be regarded as done, in favor of him to whom, and against whom from whom performance is due."

Section 3529, *Civil Code of California.*

If this release provision required of the trustee that in addition to receiving and transmitting the release money it should also make a conveyance, then for all practical purposes the conveyances were made if the two maxims of jurisprudence above quoted are made to apply.

THIRD POINT: *The sale of released lots was not only not a condition of the trust agreement but was not a matter of inducement for the plaintiff to enter into the agreement.*

Plaintiff urges that there was no obligation on the part of Blochman to sell any of the property; that any provisions in the trust agreement concerning a sale were permissible on its part. That being the case, it must follow that the provisions for partial releases were inserted solely upon the request of Blochman in order that he might make some disposition of portions of the property so as to assist him in raising the full amount of the purchase price and paying it as it became due. Conceding for the purpose of argument that Blochman had only in mind sales and not hypothecations at the time the trust agreement was made, there is still no evidence that the plaintiff had in mind sales as distinguished from any other manner of disposition of the property, or in fact any treatment of the property other than its release from the lien of the trust. Blochman had in mind the sale of the property to raise the money. The plaintiff had in mind the payment to it of an extraordinary large

release price, so that the release of the lot would not jeopardize its interest or impair the security on the remaining property. Plaintiff admits, indeed urges, that so far as it was concerned it only consented to or permitted sales, not required them. Upon analysis, therefore, it must be apparent that there was only one consideration or matter of inducement for the insertion in the Trust Agreement of the release provision, upon which the minds of both parties met, and which consideration was agreeable and satisfactory to both parties—the fact that the plaintiff conceded to Blochman the right to partial releases and in return therefor required the payment of the stipulated sums per lot. If the words "may be sold" have anything to do with the matter at all, they are explanatory only of the reason why Blochman desired a provision for partial releases, and it does not appear either from the Trust Agreement or the evidence that anticipated sales were in any wise a matter of inducement for the plaintiff to enter into the agreement.

Nor can plaintiff urge that it had in mind the enhancing of the value of the remaining security by the improvement and occupation of the lots purchased, for in that case it should have inserted in the Trust Agreement a condition precedent to the acceptance of the release price on the part of the trustee and the consequent conveyance of the land, so that before any party should be entitled to a conveyance he should give sufficient assurance that the property would be so improved as to enhance the value of the remaining security. But the Trust Agreement does not contain any such condition; neither did plaintiff prove or offer to prove that such was its

intention or that such was a matter of inducement or consideration for its execution of the Trust Agreement. And even if it had proved that such was its intention and that the improvement by purchasers of lots released or deeded was one of the matters or things inducing it to sign the agreement, then unless the instrument contained a statement of that fact or otherwise made it plainly appear by covenant or condition, the trustee would not have been bound thereby, for as stated in *Winton* vs. *Fort,* 59 N. C., (5 Jones Equity) 251, matters of inducement in a conveyance of land are not allowed to have the effect of defeating an estate or preventing it from vesting, and if such be the intention of the parties it should be expressed in the shape of a condition, either in the conveyance by which to defeat the estate, or as a positive stipulation, in default of which the contract to sell is to be void and of no effect.

Moreover, in order that plaintiff may recover on this particular charge, viz: that the trustee released lots on hypothecations instead of sales, it must show that it was damaged by such release and also the extent of such damage. This plaintiff has not done nor offered to do for the very patent reason that it can show no damage. As to the lots actually sold, its own evidence proves that not one of the purchasers of the property has improved the particular lots purchased. Does the plaintiff demand damages from the trustee on that account? Certainly not, because to maintain any right on that account it would first have to show not only a condition that a sale should be made, but also that the purchaser should be bound to place improvements on the lots purchased to an extent or an amount certain and within a time certain,

And if the plaintiff cannot maintain such a right, then its argument for the purpose of defeating hypothecations on the ground that only actual sales were contemplated must fail.

FOURTH POINT: *The amounts to be paid for releases have no connection with sale prices.*

The first sentence in the release paragraph states that when subdivided the real property may be sold by the beneficiary upon payment to the trustee for the benefit of plaintiff of a sum equal to $1000.00, etc. There is nothing to connect the $1000.00 paid for release of an inside lot, or $1200.00 for corner lot, with the purchase money or any part of the purchase money. The contract does not say that the beneficiary shall pay the trustee $1000.00 of the purchase money, or any part of it; in fact, the lot might have been sold for $500.00, and it would have made no difference to the plaintiff if the plaintiff had received his stipulated release price, $1000.00 or $1200.00. And the next sentence in the release paragraph provides for the trustee making deeds when there shall have been paid to it the sum per lot hereinbefore stated. There is no indication here that the trustee shall collect or receive a part of the purchase price of the lot; it is only provided that someone shall pay to the trustee the stipulated release price and thereupon the trustee shall dispose of the property. The next sentence provides said amounts are to be paid to the trustee until the entire indebtedness secured by the Trust Agreement has been paid. Now what amounts are intended: the purchase price of lots? That could not be, for no power of sale is vested in the trustee, and nothing has been said concerning the power of the trus-

tee to receive the purchase price of lots sold by the beneficiary, or in fact anything concerning purchase price paid by third parties for lots. This, then, means that the $1000.00 amounts or stipulated release prices shall be paid to the trustee until plaintiff has been repaid in full.

FIFTH POINT: *The trifling compensation provided for the trustee implies that it did not and could not assume responsibility of seeing that sales had been or were being made upon any order for deed.*

The amount to be paid the trustee under the provisions of this trust was such as to compensate it only for a foreclosure sale, or for receipting and accounting for the monies. The Trust Agreement did not provide that Blochman should furnish the trustee with proof that any lot had been sold, when he should apply for a deed to the same, and that being the case it cannot be supposed or presumed that the trustee, for such a small remuneration to be paid it, would have undertaken the burden and obligation, not only of making inquiry but also of obtaining absolute proof in each instance as to whether an actual sale had been made, whenever $1000.00 should be paid to it by Blochman and a demand made for a release or deed. The authority to sell was given to Blochman, or his assigns; the direction to convey was given to the trustee to be followed "whenever" there should be paid to it the stipulated sum per lot, not when a sale should be made. The Court has not the right to incorporate two conditions in the contract when the parties inserted but one, or to hold that two things must be done before the trustee could release or deed a lot, when the parties agreed that such release should be made on the performance of one of those things.

SIXTH POINT: *The Trust Agreement did not constitute a Trust to Sell.*

In order to recover either from the trustee, or from the beneficiary or his assigns, on the ground that there were hypothecations and not sales of lots, the plaintiff would have to *allege* and *prove* that this was a *trust to sell,* and it has done neither. Its allegations stand entirely on the trust agreement. The construction of the agreement is exclusively a matter for the Court, and is not to be varied by the testimony of the parties who drafted it, as to what they intended it to provide. A trust to sell must vest not only a power of conveyance in the trustee but also the power to bind *all the parties* to a *sale.* Suppose the trustee in this instance had effected a sale of a lot for $500.00 and the purchaser was now before the court demanding a conveyance, would plaintiff admit that the sale was valid? We have no hesitancy in assuming an emphatic negative answer, based on the ground that the trustee had no power of sale so as to sell the property *out of the trust* or so as to bind plaintiff to recognize the purchaser. Now, suppose the sale had been negotiated by Blochman, and the circumstances were as above stated, would plaintiff recognize the purchaser? Assuredly not. Its answer in either case would be, that neither the Trustee nor Blochman could sell the property upon their own terms so as to compel it to recognize and submit to the sale, and, if injured thereby, to have recourse only upon the trustee or Blochman; it would urge, that on the contrary, the sale was invalid *ab initio,* because neither the trustee nor Blochman had any *power of sale in trust.*

The fact is, that the agreement is merely a trust deed providing for partial reconveyances upon payment of certain sums, which fact plaintiff concedes (Opening Brief, page 47) in the following language:

> "It was in substance an agreement on part of the plaintiff *for the benefit* of Blochman, providing for *future partial releases* to be made by it through the Trustee, of lots *from the lien* for the whole unpaid purchase money, upon application of stipulated sums * * * * *."

SEVENTH POINT: *The sole condition attached by the plaintiff to a conveyance by the trustee was the payment of the release price.*

This being a general discussion distinguishing sales and hypothecations, we do not intend that the above sub-title shall extend to releases prohibited while any money expended by plaintiff for payment of delinquent taxes remains unpaid to it from Blochman, that matter having been elsewhere treated herein.

The sub-title for this point is a general statement which must follow as a natural conclusion from the facts, authorities and arguments above stated. It is also the natural conclusion attendant upon a correct reading of the Trust Agreement itself. We do not propose to elaborate on anything that has gone before, but only to call attention to some additional matters re-inforcing and supporting this conclusion.

The first of these is the extraordinary release price fixed by the plaintiff on the release of lots. Here was an indebtedness of $125,000.00. The vendee was required to so subdivide the land that there should be not less than two hundred fifty lots of certain specified dimen-

sions, conforming to which requirement the vendee subdivided the property in such manner as to make two hundred eighty-eight lots. The instrument provides that inside lots shall be released on the payment of $1000.00 per lot, and corner lots at the rate of $1200.00. Standing upon the original requirements of the Trust Agreement, this would require the payment, in order to release any lot, of more than double its proportionate share of the entire indebtedness, and in view of the fact that the vendees actually subdivided the tract into two hundred eighty-eight lots and that the same price obtained as if there were only two hundred fifty lots, it appears that the release price for each lot was in fact almost three times the proportionate share of the respective lot toward the total indebtedness. It would be strange indeed if the vendor should enter into a contract claiming that actual sales of property was an inducement for its consent to partial releases when at the same time it should safeguard itself by requiring the payment of a sum for each lot purchased so disproportionate to its share of the indebtedness. This point is emphasized by the fact that payments on the indebtedness were not to have the effect of reducing the release prices. If only $10,000 of the original purchase price remained unpaid and only one lot had been released, and the remaining two hundred eighty-seven lots still remained as security for that unpaid balance of $10,000.00, it would still be necessary for the beneficiary under the trust agreement to pay $1000 per lot for inside lots and $1200.00 for corner lots to obtain releases.

Again, recurring to the Trust Agreement, we discover that while the word "sold" is used only once in the re-

lease provision, the words relating to the payment of the release price are numerous and insistent. The plaintiff prepared this contract. What was foremost in its mind in the preparation of this particular provision; the fact that the property should be sold, or the fact that it, plaintiff, should be paid the sum of money representing the release price? Bear in mind that the request for releases had come from Blochman, for, as plaintiff maintains, the right to release was permissive only on its part. The provision is capable of but one construction, that the plaintiff in complying with this request for releases from Blochman had uppermost in its mind the fact that it must first receive the full purchase price of the lot on its sale to Blochman, viz: the proportionate share of the property sold to the unpaid balance of the purchase price, and an amount equal to almost twice as much in addition thereto, to repay it for the breaking up of the tract into smaller subdivisions. That the payment of the release prices was more important to it than the sale is evidenced by the fact that the word "sold" is used only once, while the matter of payment is evidenced by the words "upon payment", "for the benefit of the payee", "a sum equal to $1000.00", and "$1200", "which sums shall be paid by the trustee to the payee", "so soon as received", "in full", "without any reduction", "or any expense whatever to the payee". Such anxiety on the part of the plaintiff to receive immediately, in full, without reduction, without cost, without expense, the amount of the release price, as is displayed in this release provision, does not justify the plaintiff now in attempting to argue that the matter of the sale of the property was of equal or greater importance than the payment of the

release price. And if plaintiff cannot show by positive proof that it was a matter of equal or greater importance, or a condition attached to the conveyance or the Trust Indenture, then it has no ground upon which to stand in a Court of Equity in an attempt to assail the manner of disposition of property for which it has received full value, not merely two-fold, but almost three-fold.

4. Releases Were Available on Interest Payments.

The beneficiary was entitled to a release of a lot on the payment of the specified sum, whether that sum was credited by the trustee on principal or interest whenever it was paid "for the account of the payee". The language used does not authorize the trustee to refuse to release a lot because the $1000.00 paid was credited by it on interest. The contract does not either expressly or impliedly provide that the payment must be on account of principal to entitle the beneficiary to a release, or that no release shall be made on account of any payment of interest. But it does expressly provide, that whenever the stipulated amount is paid to the trustee for the "account of the payee" it shall deed the lots directed by the beneficiary to be conveyed. "For the account of the payee" means for the payee or for the benefit of the payee. And the money is as clearly paid for the payee, or for its account, when it is paid on interest as when paid on the principal or purchase price of the land.

That the parties to the agreement so understood, it seems clear when we compare the language above referred to with the following provision:

> "Whenever one thousand dollars ($1000) shall be paid to said payee on account of said sum of $125,000.00 the interest on the amount so paid shall cease, and all payments made on account of sales, or otherwise, shall be credited on the first maturing obligation of said beneficiary."

Here is a provision relating to the payment to the trustee not "for the account of the payee", but "on account of said sum of $125,000.00" being the purchase price or principal.

By virtue of this provision, interest would only cease on the $1000.00 paid, when it was paid on the principal. But under the previous clause, the payment of $1000.00 to entitle the beneficiary to a release was not required to be made on principal, but he became entitled to a deed of an inside lot "whenever" $1000.00 was paid "for the account of the payee". Clearly, the parties cannot be presumed to have meant the same thing by the terms "for the account of the payee" that they did by the words "on account of said sum of $125,000.00". They took pains to provide that interest should not cease on payments unless they were made on the principal, and they were at equal pains to authorize the release of lots whenever the stipulated amount was paid "for the account of the payee", whether on principal or interest. The clause that all payments shall be credited on the first maturing obligation of the beneficiary, it is submitted, does not mean as claimed by plaintiff, the first obligation maturing in the future. It means, that if when a payment is made, two or more installments of the purchase price are due, the payment shall be applied on the one first falling due. Elsewhere the contract

contemplates overdue installments, by providing that if any installment is not paid when due it shall bear interest at seven per cent. per annum instead of the five per cent. that is to be paid on it before its maturity; and if the payee shall pay any taxes or assessments that are to be paid by the beneficiary the amounts so paid shall constitute additional indebtedness of the beneficiary to the payee and bear interest at seven per cent. per annum. So, we say, it must be held that the provision for crediting payments "on the first maturing obligation" does not have the meaning contended for by plaintiff, but does mean that such payment shall be credited on the obligation that first matures, prior to the making of the payment, and then remaining undischarged.

In its Opening Brief (page 64) plaintiff indulges in an arithmetical problem calculated to show (among other things) what might happen were all the property permitted to be released on payment of interest. Plaintiff neglected to state, however, that these items were comprised not only of the unpaid principal, but of interest for the two years and more during which plaintiff was litigating this case, and also included all taxes and assessments levied and paid during that period, which items of interest and taxes and assessments could not have been included had plaintiff stood upon the plain provisions of the trust agreement and foreclosed the beneficiaries' rights by trustee's sale three years prior to the date of this brief. Contrary to plaintiff's statement, the debt has not swelled while it was consuming its own security, but has swelled while its security stood intact, and plaintiff elected to pursue a different remedy to recover on the security than that it had pro-

vided for itself by the trust agreement. Were the trustee able to do so without descending from the dignity of its office as such, it might answer this (as well as plaintiff's next argument that there was thus accomplished the fabled feat of the serpent swallowing itself) by retorting that the serpent in this instance is as wise as the serpent of old and as crafty and as exacting, and the strictness with which it has, according to the correspondence making up the exhibits in this case held Blochman, the La Binda Park Syndicate and the trustee to the time and terms of payment and the covenants of the trust agreement, indicate that no such forbearance in time of payment of the principal could have possibly occurred nor could any forbearance to a lesser extent have occurred as to have hindered plaintiff in the collection of its principal sum within a reasonable time, having at all times an adequate amount of security in the property. If, as plaintiff infers, the releasing of lots for interest and overdue interest would in time have resulted in the release of all the security without the payment of the principal indebtedness, then that result would have been due entirely to the negligence of the plaintiff, for it, according to the provisions of the trust agreement, while interest was in default, could have declared the whole amount of the indebtedness due and payable and foreclosed the rights of the beneficiaries thereunder. There were two hundred eighty-eight lots in the subdivision and the release prices were $1000.00 for inside lots and $1200.00 for corner lots, making a total of approximately $300,000.00 in release prices. The interest on the original indebtedness was only $6250.00 a year, so that to release all the security upon

the payment of interest alone would have required forty-eight years' time; thus it will be seen that the margin of security in the event of partial releases was so great as that the plaintiff could never have been injured by the release of lots upon payment of interest except by its own negligence.

5. The Releases Are Supported by Judicial Precedents.

The right to releases was not conditioned except upon the payment of $1000.00 for inside lots and $1200.00 for corner lots in the subdivision. If the first releases were not made before June 28th, 1913, it is clear that they were not made except upon a payment to the trustee of the stipulated amount per lot and upon the receipt of that amount by the trustee, it was its duty to make the release. The beneficiary was not in default at the time any of the releases were executed. Even if he had been in default, under the authorities hereinafter cited such default would not have precluded him from demanding a release upon payment of the stipulated amount per lot. These authorities sustain the proposition that at any time before a sale by the trustee the beneficiary would be entitled to a release if he paid the release price per lot. Even where time is made the essence of a contract, the failure to perform will not defeat the right of the party thus failing if the condition is subsequently carried out. This was expressly held in *Cheney* vs. *Libbey*, 134 U. S., 68, 33 L. Ed., 818, where the court, after determining that time was of the essence of the instrument under consideration, said:

"But there are other principles, founded in justice that must control the decision of the present case. Even where time is made material by express stipulation, the failure of one of the parties to perform a condition within the particular time limited, will not in every case defeat his right to specific performance, if the condition be subsequently performed without unreasonable delay and no circumstances have intervened that would render it unjust or inequitable to give such relief."

In *Camp. Mfg. Co.* vs. *Parker,* 91 Fed., 705, the United States Circuit Court of Appeals in the Fourth Circuit held that:

"Even when time is made of the essence of a contract, the failure of a party to comply with a condition within the particular time limited will not work a forfeiture nor defeat the right to enforce specific performance, where such condition is complied with within a reasonable time and no circumstances have intervened to render it unjust or inequitable to grant such relief, but on the contrary it would be inequitable to withhold it."

The plaintiff has called upon this court, sitting as a court of equity, to enforce a forfeiture of all the rights of the beneficiary and those who have acquired the lots under him and at the same time retain all the moneys paid by the beneficiary or these other persons to secure the release of the lots. It is well settled that courts of equity will never enforce a forfeiture. (*Keller* vs. *Lewis,* 53 Cal., 113; *McCormick* vs. *Rossi,* 70 Cal., 474; 2nd *Storey's Equity Jur.* Section 1319; *Spies* vs. *Arvondale etc. Co.,* 55 S. E., 466.)

In the *McCormick* case it was held that the failure of a vendee under a contract for the sale of land to pay the purchase price within the time stipulated or to perform other conditions of the contract, is no ground for a decree in equity declaring a forfeiture of his rights and that a court of equity will never enforce a penalty or forfeiture. The Supreme Court reversed the Judgment of the lower court by which the rights of the vendee under the contract were declared forfeited and the possession of the land restored to the plaintiff.

In courts of law forfeitures are not favored and a construction of a contract will be adopted, if possible, that will avoid a forfeiture, and conditions involving a forfeiture must be strictly interpreted against the party for whose benefit they are created. (Civil Code, Section 1442; 9 Cyc. 587; *Franklin etc. Co.* vs. *Wallace,* 93 Ind., 7; *Letchworth* vs. *Vaughn,* 90 S. W., 1001.)

The authorities on which the trustee relies in support of its right to release lots on payments by the beneficiary, and in which, principles similar to those involved in this action were considered and applied, are as follows:

Nims vs. *Vaughn,* 40 Mich., 356;

Lane vs. *Allen,* 44 N. E., 831;

American Net and Twine Co. vs. *Githens,* 41 Atl., 405;

Hall vs. *Home Building Co.,* 38 Atl., 447;

Obern vs. *Gilbert,* 50 N. W., 620;

In re Saeger's Appeal, 96 Penn. State, 479;

Gammell vs. *Goode,* 72 N. W., 531;

Vawter vs. *Crafts,* 42 N. W., 483;

Peoples Savings Bank vs. *Nebel,* 52 N. W., 726;

Chrisman vs. *Hay,* 43 Fed., 552;

Clark vs. *Fontain,* 10 N. E., 831;

Bartlett Estate Co. vs. *Fairhaven Land Co.,* 94 Pac., 900;

Ventnor Investment Co. vs. *Record Dev. Co.,* 80 Atl., 952;

McComber vs. *Mills,* 80 Cal., 111;

Wallowa Lake Amusement Co. vs. *Hamilton.* 142 Pac. 321.

On comparison it will be seen that plaintiff also relies in part upon four of these cases, viz: *Bartlett Estate Co.* vs. *Fairhaven, Ventnor Investment Co.* vs. *Record Dev. Co., McComber* vs. *Mills, and Wallowa Lake Amusement Co.* vs. *Hamilton, supra.*

Upon examination of the cases above cited and those cited by plaintiff, it will be seen that they have been generally classified and applied with relation to two simple questions, the answer to which has decided whether or not the right to release existed.

First: Was the right to release expressly conditioned with respect to any default in the mortgagor's covenants, or otherwise qualified with respect to time?

Second: Was the payment, upon which the release depended, made or tendered distinctively as a payment for release?

With relation to the time when and during which the release clauses in the case at bar should be effective, it is to be observed that *"when so subdivided"* the beneficiary may obtain the conveyances *"whenever* there shall have been paid to the trustee" the stipulated release price. This right is only suspended when taxes become delinquent and are paid by the plaintiff, and the beneficiary has not repaid it the amount so expended. No other

default is mentioned as suspending or annulling that right. And that all the payments were made *distinctively as release payments* cannot be questioned, for twenty-three specific lots were released on the June payment, (Opening Brief, page 39); the release of five other lots was demanded at that time, and treated as released by the trustee after its counsel had had opportunity to consider the matter (Tr., pp. 372, 402, 403, 420, 421; Ex. 52, Tr., p. 503; Ex. 53, Tr., p. 505; Ex. 55, Tr., p. 507; Ex. 56, Tr., p. 508); and the remaining two lots were released on the payment in October (Steketee transaction), *and necessarily so, in every instance, inasmuch as the lots so released, were by concurrent action, utilized in obtaining the various sums paid on those dates.*

Proceeding now to apply and distinguish all these cases with relation to these two simple questions, we submit it will be clearly apparent that not only was the trustee bound to make the releases demanded, and made, but that the plaintiff was also bound to assent thereto.

The general rule on the first essential is enunciated in the most recent case on the subject, that of *Fulton* vs. *Jones,* 153 N. Y. S., 87, 90, (1915) as follows: "In New Jersey, Minnesota, Michigan and Iowa it has been held that, where there is no express limitation within which the privilege may be exercised, it may be exercised *at any time before the rights of the mortgagor are actually foreclosed*" (citing authorities) and referring only to the Massachusetts case of *Reed* vs. *Jones,* (133 Mass., 116) as declaring a contrary doctrine. A *resume* of the authorities cited in the reported case, as well as

those of other jurisdictions, sustaining the general rule, and pertinent matters in each case, now follows.

In *Nims* vs. *Vaughn,* 40 Mich., 356, the mortgagee agreed to release the first three lots which might be sold, without any payment or substitution of security. Held that the release provision survived the default, the suit to foreclose and the decree of foreclosure, notwithstanding that "while the debt of Vaughn has been steadily increasing, the value of the land has been steadily diminishing and it is conceded that the mortgagor is irresponsible and that nothing beyond the land can be obtained in enforcing these securities, but this is a risk that the mortgagee took when taking the papers".

In *Lane* vs. *Allen,* 44 N. E., 831 (Illinois) the mortgagee agreed "that said premises *may be subdivided* and that on payment of $500 or more at any time or times on the indebtedness secured, parts of said land shall be released therefrom, etc." (specifying mode of determining quantity to be released). Held, that the release provision could not be operative unless there should be a subdivision, but whether the subdivision was before or after the payment was immaterial, that the release was conditioned only upon the payment of money, that the right to release was not cut off by default in payment of the indebtedness or the suit to foreclose (the purpose of the action), also "it is said that Lane chose the best lots in demanding a release. It would be singular if he did not make such a selection, but the demand was in accordance with the agreement which fixed different rates for lots according to their location. The fact that he exercised his right to make such a selection cannot affect this claim".

In *American Net and Twine Company* vs. *Githins,* 41 Atl., 405, (N. J. Eq.) the release became available as to one lot "when" pre-existing mortgages had been reduced to a stipulated amount, and as to the other, "upon payment" of a fixed sum. The suit was to foreclose the mortgage. As to the first lot, said the Court,

> "The principal insistence of the complainant is, that lot number one is not released because all the money by which the pre-existing mortgages were reduced to $4000.00 *was not paid before the maturity of the concurrent mortgages.* I am of the opinion that it was not essential that it should be so paid. *There was no limitation as to the time of payment contained in the clause providing for the release.* * * * * The clause really provided for the reduction of lot two by the payment of $5000.00 in reduction of the prior incumbrances upon these lots, and *the right of redemption existed until it was foreclosed".*

And as to the second lot, as to which the release price was not tendered until after foreclosure had been commenced,

> "I remark concerning this lot, as I have observed in regard to the other lot, that the provision for a release fixed the sum upon the payment of which this lot should be redeemed from the incumbrance of the mortgage. The title of this lot was held by Mrs. Larabee alone. I think that a fair construction of the contract between her and the mortgagees was that *she could discharge her lot by the payment of a stipulated amount at any time before her equity of redemption was foreclosed."*

To the same effect are *Hall* vs. *Home Building Company,* 38 At. 447 (N. J. 1897), wherein tender was made after the foreclosure proceeding had been commenced; *Obern* vs. *Gilbert,* 50 N. W., 620 (Da.) (lot permitted to be released after foreclosure); *In re Saeger's Appeal,* 96 Penn. State 479, in this case it being further held that it was not necessary that the mortgagor should pay interest on the entire debt in order to secure the release; *Gammel* vs. *Goode,* 72 N. W., 531 (Iowa), wherein the Court said "It is thought that the right is not available after default in payment, and the commencement of a suit to foreclose. There is no such limitation in the covenant", and upheld a partial release notwithstanding that the lot in question was the only remaining security, and its release at the stipulated price left part of the debt unsecured, nor is this case overruled by *Baldwin* vs. *Benedict,* 82 N. W., 956, as plaintiff suggests (Opening Brief, page 90) for in the latter case the release provision was made effective "only during the pendency of the above described mortgage", and is thus clearly distinguishable.

In *Vawter* vs. *Crafts,* 42 N. W., 483, (Minn.), the court, construing a covenant for partial releases said:

> "We are of the opinion that the right to a partial release upon the stipulated terms continues *until the mortgagee has exercised the power by sale of the mortgaged premises, and even after default by the mortgagor.*"

Directly in point is the case of *Peoples Savings Bank* vs. *Nebel,* 52 N. W., 726 (Michigan) wherein the Supreme Court of Michigan had under consideration a release agreement in a mortgage reading as follows:

> "The mortgagee agrees to release and discharge from the operation of this mortgage any piece or parcel of land described therein upon *payment* to it at *any time* of a sum equal to the amount of the value of such piece or parcel of land so released or discharged."

The action was one to foreclose the mortgage, and the defendant desiring to redeem a certain lot, appealed from the judgment of foreclosure and by the decision of the Appellate Court was allowed to redeem upon payment of the value of the land at the date of redemption, thus holding that the provision for releases survived the default and the commencement of action to foreclose and the judgment of foreclosure. It will be observed that the release clause in this case is substantially identical in its material features with the one involved in the case at bar.

The case of *Chrisman* vs. *Hay,* 43 Fed., 552, was an action in the Circuit Court (Iowa), wherein foreclosure was sought of a certain mortgage containing a release provision as follows:

> "It is hereby agreed * * * that upon the payment of $32.80 per lot and interest, said mortgagees agree to release any five or more lots, at any time hereafter when called upon to do so".

The mortgage also contained a stipulation to the effect that upon a failure to pay any part of the principal or interest, then the whole sum secured should become due and payable. The language in this release provision should be compared with that of the case at bar, wherein the trustee is authorized to make conveyances "*whenever* there shall have been paid to it" the stipu-

lated release price. It is also noteworthy that in the *Chrisman* vs. *Hay* case default in payment of principal or interest *ipso facto* rendered the whole amount of the debt immediately due and payable. Nevertheless, the court held that as to purchasers of lots from the mortgagor, the right to releases survived not only the default and the suit to foreclose but also the decree of foreclosure, and that as to the mortgagor this same right continued until the commencement of the suit to foreclose.

In *Clark* vs. *Fontain,* 10 N. E., 831, the Supreme Judicial Court of Massachusetts, in a suit to restrain foreclosure of a mortgage wherein the mortgagee agreed "to release from time to time *whenever requested* any portion of the land on being paid" stipulated sums, declared at the first appeal (135 Mass., 464) that "the plaintiff can procure a release by the payment of the specified sum. * * * * And the bill is allowed to stand to allow him to move to amend by making it a bill to redeem", the final appeal holding that he need not pay interest on the release price, although there had been a default and a foreclosure suit had been brought.

We now invite consideration of those authorities which are cited by plaintiff as sustaining its contentions and which we believe on the contrary, unmistakably support the trustee's.

In the case of *Bartlett Estate Company* vs. *Fairhaven Land Co.,* 94 Pac., 900, (Wash.) the mortgage provided for partial releases at any time *"prior to maturity of the mortgage debt"*. The mortgage also provided that in case of default by the mortgagor in making partial payments the mortgagee might mature the whole

indebtedness by a declaration to that effect. The court held that the right to releases did not continue after the mortgage debt matured and that, by the terms of the mortgage, the debt could be made to mature by the mortgagee upon a default in paying any of the installments or taxes, and that the mortgagee having exercised such option and declared the entire mortgage indebtedness due, on account of the peculiar wording of the mortgage, the right to partial releases did not survive the maturity of the whole indebtedness brought about in that way. The inference is very clear that but for the provision in the mortgage continuing the right to partial releases only so long as the mortgage debt had not matured, such right would have existed after maturity and could have been exercised as well after the entire indebtedness became due as before. In the case at bar there is no such language in the agreement; nothing that limited the right to releases "prior to maturity" of the purchase price.

Nor does the distinction attempted to be drawn by plaintiff in the case of *Ventnor Investment Company* vs. *Record Dev. Co.,* 80 Atl., 952, (N. J.) (Opening Brief, page 50) apply to the case at bar, for therein the court, after expressing a doubt whether the covenant for releases could be held to contemplate sales made after foreclosure proceedings were begun, said:

> *"But I see no reason why redemption could not properly be made by a purchaser whose purchase was made prior to default."*

According to this view of the law a purchaser from the La Binda Park Syndicate in June, 1913, could even now redeem the land bought by him, from the trust

agreement, by paying to the plaintiff or to the trustee the release price of the lots bought if he had not already done so.

The case of *McComber* vs. *Mills,* 80 Cal., 111, depends upon the answer to the second of the two questions involved in the right to release, for in that case it appeared from the mortgagor's own testimony that he never paid the stipulated release price or any other sum *distinctively* for the release of any particular lot, or with the understanding that any more lots should be released on account of the payment made (this payment being the amount of the first maturing note, at the time of which payment he received a release for ten lots, although perhaps entitled to an additional number if he should then have sought their release), and it also appeared from the mortgagee's testimony that at the time of the release of the ten lots a verbal agreement was entered into to the effect that no more releases should be had on account of the payment but that the remaining lots should stand as security for the balance of the debt. The right to a release of the additional lots was denied on these grounds. Instead of supporting plaintiff's position in the case at bar, this case sustains the trustee's contentions for it implies that the mortgagor would have had the right to obtain a release upon payment of the first maturing note, if concurrently therewith he had made a demand for the full number of lots the payment would have otherwise entitled him to, although the release provision in that mortgage was substantially the same as that in the case at bar, namely, that the mortgagee would release any lots "*whenever* the mortgagor might desire *to sell* any of them, upon the mortgagor paying

to the mortgagee the sum of $250.00 for each lot released". And in the case at bar the evidence shows that at the time of each payment Blochman or the Syndicate demanded releases of lots for the full amount paid.

In the case of *Wallowa Lake Amusement Company* vs. *Hamilton,* 142 Pac. 321, the Court was considering a suit on the part of the mortgagor against the mortgagee for specific performance of contract of the mortgagee to make releases, the mortgage containing a provision that upon payment of $30.00 for each half acre desired to be released, that quantity would be released and that the payments were to be applied *first to interest* and then to next maturing notes. The court found that plaintiff was entitled to a release of thirteen acres, having tendered the requisite amount *distinctively as a payment to secure the release,* and not primarily to pay the existing indebtedness, although by the terms of the mortgage, the release payments were made to apply on such indebtedness.

Now distinguishing plaintiff's authorities by reference to these same two questions, we submit that they will be found entirely inapplicable to the case at bar. Those in the first division, *i. e.,* dependent upon whether the right to release was expressly conditioned with respect to any default or otherwise as to time, will be first considered.

Pierce vs. *Kneeland,* 16 Wis., 673, concerned a release provision which should be effective only "provided that the covenants and conditions of said mortgage should be faithfully kept and performed", and so it was held that the right to a release did not continue after default. On account of the peculiar wording of the release agree-

ment, the court also held that the release covenant was personal only to the mortgagors, whereas in the case at bar, the release clauses were expressly made available to "the beneficiary *or his assigns*".

In *Werner* vs. *Tuch,* 5 N. Y. Supp., 219, the defendant was denied a release, upon a tender in suit to foreclose a mortgage requiring the mortgagee to accept a partial payment only so long as the mortgagors were not in default, or as the court stated it "provided they should not be otherwise in default".

Fulton vs. *Jones,* 153 N. Y. Supp., 87, declares the general rule, but does not apply it on account of the peculiar wording of the release provision (requiring thirty days notice to the mortgagee). The distinction will be clearly manifest upon a reading of the last paragraph on page 89 of the report.

Baldwin vs. *Benedict,* 82 N. W., 956, considers a release provision effective only "during the pendency of the mortgage".

Avon etc. Land Co. vs. *Finn,* 41 Atl., 366, concerned releases obtainable only "during the *existence or continuance* of the mortgage".

Reed vs. *Jones,* 133 Mass., 116, and its companion case, *Clark* vs. *Cowan,* 92 N. E., 474 (Mass.), are relied upon by plaintiff as declaring the rule upon which its argument against the validity of the releases after default is based, and even if they could be held to apply to the case at bar (which is questionable, indeed), will be found not only unsound in principle, but as standing alone *against the entire weight of authority in every other jurisdiction.* That *Reed* vs. *Jones* is authority at all, is exceedingly doubtful, for it appears that the re-

lease was not demanded until more than two years after the stated maturity of the mortgage note, and although plaintiff was in default in payment of taxes and interest he sought "to obtain a release without such payment". Furthermore, in that case the conditions of the mortgage, in which were inserted the release clause, read:

> "*Provided,* nevertheless, that if the grantor, his heirs etc. * * * shall pay unto said grantees, or their executors etc. * * * the sum of $26,201.00 in five years from date hereof * * * and interest etc. * * * and the said mortgagees * * * hereby agree * * * that they will at any time release * * * any portion of said premises upon the payment * * at a sum not exceeding the rate of twelve cents per foot * * * and also pay all taxes and assessments, then this deed etc. * * * to be absolutely void etc. * * * ."

The court may well have been justified in assuming that this peculiar and confusing language made the covenants interdependent. Moreover, a later case by the same court, *Clark* vs. *Fontain, supra,* held absolutely to the contrary on two separate appeals, and therefore must be considered to have overruled it. Nor can it be said that *Clark* vs. *Cowan, supra,* in turn overrules *Clark* vs. *Fontain* and reinstates this unsound doctrine, for in the *Clark* vs. *Cowan* case the Court determined that the covenant for partial releases was a personal one, applicable only to the mortgagor (not the mortgagor "and his assigns" as in the case at bar) and could not be taken advantage of by one claiming under him. What the court said with reference to releases being applicable

only to payments before maturity of the debt was not only unsound in theory and not only unnecessary to a decision of the case, but especially unsound because it quotes *Reed* vs. *Jones, supra,* as a *general* authority on the subject, which we submit, is not true. Nor is the attempt of *Clark* vs. *Cowan* to distinguish the intermediate case of *Clark* vs. *Fontain, supra,* of any avail (See Opening Brief, last paragraph page 50) for there was no necessity for the court in the *Fontain* case to expressly refer to *Reed* vs. *Jones* in order to overrule it as declaring the general rule, because the facts were essentially different, as we have pointed out; and neither was it necessary for the opinion to refer to the fact that the mortgage was overdue, because the bill was *to restrain foreclosure of the mortgage* and the reporter's facts preceding the opinion showed that the mortgage became due November 7, 1876, that the mortgagee advertised the property for sale on March 26, 1878, under power of sale in the mortgage, this sale being the one sought to be enjoined. Furthermore, these actions were by or on behalf of the debtor, or his assigns, against the creditor to compel a release, while in the case at bar it is not the trustee or the purchasers of the released lands who are seeking the aid of a court of equity but the creditor who has received and retains the money paid for the releases and is now trying to obtain a decree that the lands for which this money was paid are still subject to its claim, without offering to return any of that money; and this, too, upon the theory that by exercising an option to declare the entire indebtedness due for default in paying an installment, it had matured the whole debt one day before it claims the payment was made.

The case of *Weir* vs. *Iron Springs Company,* 61 Pac., 519, can also be distinguished with reference to the period of duration of the release provision, the release sought being denied to a party purchasing after a default, for the reason that the mortgage expressly provided for releases only *"until default shall be made* by the Springs Company, as specified herein, and that at any time *when no such default shall exist,* the Springs Company shall be at all times at liberty to make sales * * * and to procure the release of the property so sold." Another feature of this decision is also cited by plaintiff as sustaining its contention that releases in the case at bar were limited to sales. This argument we have already fully answered, and it will suffice to distinguish the two cases, to say that the reported case involved a release clause *inseparably connected with the purchase price* to be paid by the new purchaser, and even defined the terms of sale, the case being decided not on the ground that there was no sale, but that these terms of sale requiring the payment to the trustee of a certain amount of cash and the delivery of substituted securities of a specified amount and character in order to effect a release, were not complied with. The mortgagees in that case stipulated the amount of cash and character of substituted securities, upon receipt of which they would make a release, and *never received them.* In this case plaintiff fixed a stipulated release price, *and did receive and accept it.* Furthermore, in the reported case, the parties were reversed, the mortgagor's assignee suing to compel a release, upon a tender, while here the creditor, having received and accepted the release price stipulated by it, is suing to set aside the release, without refunding.

Within the second classification adopted for distinguishing these cases are found plaintiff's authorities, *Commercial Bank* vs. *Hiller,* 63 N. W., 1012, *Stephens* vs. *Keen,* 67 So., 226, and *Twitchell* vs. *Gross,* 89 Atl. 385, for in all these cases the payments were made distinctively as payments on the debt and the releases demanded were collateral or incidental to that, whereas in the case at bar the payments were made primarily as payments to secure releases, and necessarily so, inasmuch as the property thus released was by concurrent action, used in obtaining the various sums making up the payment due on the debt. Besides, those actions were brought by the mortgagors directly against the mortgagees, to compel the release, whereas the case at bar is one of rescission in which the mortgagee (plaintiff) repudiates the acts of its agent in making releases, at the same time holding the benefits derived therefrom, a situation, as we shall show, abhorrent to equity, and governed by entirely different principles.

The remaining two cases are cited by plaintiff in an effort to bolster up its argument that releases were available only upon actual sales, but they are plainly inapplicable.

Chapman vs. *Hughes,* 134 Cal., 641, concerns a sale by a trustee under an active trust which vested power of sale in the trustee, and distinguishes between a sale and exchange. In the case at bar the trustee had no power of sale except upon foreclosure of the trust agreement, and the conveyances here complained of were those made by the trustee to the beneficiary which were authorized by the terms of the trust, the power of sale thereafter vesting in the beneficiary as a matter of course

and right, as well as by the terms of the Trust Agreement; and as a matter of fact in the case at bar a conveyance by the trustee had no more effect than to release plaintiff's lien upon the property and did not actually dispose of it unless with the consent and concurrent action of the beneficiary.

The case of *Lamar Land and Canal Co.* vs. *Belknap Savings Bank*, 64 Pac., 210, likewise has no application, for it appears in that case that certain water rights covered by the mortgage might be released from its lien by the trustee whenever and as they were sold *by the trustee* at a specified price. Like the case of *Chapman* vs. *Hughes supra,* the trust contemplated disposition of the property *by the trustee,* and directed the manner of sale and the manner of fixing the sale price. The case does not expressly or impliedly decide that the trustee could not have conveyed to the beneficiary, provided the sale was had for the price and in the manner provided by the trust indenture. The transactions were set aside *on the ground that no money was paid at all,* the trustee claiming that by reason of certain alleged advances made by it, but not proved, it had conveyed the water rights to itself and the conveyance was consequently set aside upon the ground of fraud and lack of consideration. In the case at bar there was no fraud on the part of the trustee, for it claimed and claims no interest in the property for itself and it paid the plaintiff the full release price in every instance, and, sufficient above all other reasons, it had no power of sale.

In concluding this portion of the argument, we submit that these authorities fully sustain the contention of the trustee that all the releases made by it were valid, for

the release provision in the case at bar was not expressly conditioned with respect to any default existing at the time of release, or otherwise qualified with respect to time, and all payments were made distinctively and primarily as payments for releases; and therefore the right to releases survived any and all defaults of the debtors *and is still in force.*

6. Time Was Not Made of the Essence of the Contract as Regards the Right to Release.

If the following provision, "and it is further understood and agreed that in every particular, time is of the essence hereof", is applicable to any part of the instrument, except the paragraph in which it is written, the beneficiary was not deprived of the right to have lots released upon the payment of the stipulated sum and the Trustee was not relieved of the duty of making such releases on the payment of that sum. *Nowhere in the instrument is there any provision that the right to releases shall cease upon a default,* but the Trustee is directed to execute deeds on any lot or lots to the order of the beneficiary *"whenever* there shall have been paid to said trustee for the account of said payee the sum per lot as hereinbefore stated". "Whenever there shall have been paid to the said Trustee"; not whenever there shall have been paid, prior to the default by the beneficiary—not so long as the beneficiary shall have performed all of the obligations of the instrument strictly in accordance with its terms, shall he be entitled to releases, but "whenever" he pays to the Trustee for the account of the plaintiff $1000.00, he shall be entitled to a conveyance of the lot paid for. To say that this right ceases upon default by

the beneficiary in the performance of some covenant of the agreement, is to incorporate into it a stipulation that the parties did not put in it, it is to make for these parties a contract different from the one they did make, a new contract. The most that can be claimed for the provision relating to time being of the essence of the agreement, is that that provision authorized the plaintiff to take action when there was a default on the part of the beneficiary. We insist that it cannot be maintained that this provision terminated the right of the beneficiary to releases. That right would continue even though the plaintiff had declared the whole amount due. There is nothing in the contract to the effect that if the entire purchase price of the land becomes due and payable, either by the lapse of time or by a declaration of the plaintiff, based upon a default of the beneficiary, that the beneficiary shall not have releases of individual lots upon the payment of the stipulated amount therefor. If the contention of plaintiff is correct, the beneficiary would not be entitled to a release of a single lot, although he had made all of the payments when they came due, except the last one of $50,000.00. Under this contention, so long as any part of that last payment remained due and unpaid, the beneficiary could not secure the release of a lot, although perhaps all but a few thousand dollars of the purchase price had been paid, and not a single lot released. For if the provision concerning time being of the essence of the agreement destroys the right to a release in case of default in making the first payment, it would equally annul the right to a release for a failure to make any part of the last payment, if that last payment were past due, although all of the

preceding installments had been discharged in accordance with the terms of the instrument. We say the parties never intended any such a result, that they never intended that the right to release a lot should be lost by a default on the part of the beneficiary if he came forward and paid the release price. The contract expressly provides for the application of these lot payments and that they shall be credited on the first maturing obligation of the beneficiary, which, as we have seen, means the obligation first maturing and which had not been discharged. The Trustee or plaintiff could, and were required to, credit the lot payment upon such obligation no matter how many other obligations were delinquent. This contract, as we have seen, *was prepared by the plaintiff* and it is, in a court of equity, insisting upon the rigid, merciless and harsh enforcement of it, but the court will give such a construction to it as is most equitable to the parties and will not give one of them an unfair advantage over the other, and will not deprive the beneficiary of any benefit arising under even a belated performance unless the court is compelled by the clear and unequivocal language of the instrument and an imperative duty imposed by law to do so. (9 Cyc. 587, and *Smiley* vs. *Gallagher,* 30 Atl., 713.)

The trend of judicial opinion, as we have pointed out, is against the application of a provision making time of the essence of a contract unless it is inescapable. Further evidence of this rule may be found in *Van Vranken* vs. *Cedar Rapids etc. Co.,* 5 N. W., 197 and 7 N. W., 504, wherein it was decided that in a contract for the sale of lands which makes time of payment of the purchase money of its essence and further requires the pur-

chaser "regularly and seasonably to pay all taxes" but fixes no definite time for their payment, the provision making time essential does not apply to the payment of taxes.

In concluding this phase of the matter, we would like to illustrate the equities in favor of the beneficiary and the Trustee in this regard. Our illustration will not take into account Blochman's collateral covenants, for we are convinced that plaintiff's contentions regarding them will not be sustained.

Assume that after the map of La Binda Park had been duly filed, and before May 1, 1913 (for instance on April 30, 1913), Blochman had paid to the Trustee the interest then in default and had also paid Twenty-five Thousand Dollars ($25,000.00) and demanded twenty-five lots. The principal sum was not then due, the payment of interest would purge his default (if, as plaintiff contends, such default prohibited releases being made), and Blochman, according to the terms of the trust agreement, and as plaintiff must concede (except as regards its contentions regarding Blochman's collateral covenants), would be entitled to the twenty-five lots demanded. Would plaintiff be then in any position to urge that it had been damaged by the release of lots which it had provided for? But plaintiff argues that payment of the principal installments when due or overdue would not so entitle him and that the Trustee's action in releasing the lots injured plaintiff. To so hold would be to hold that the payment of Twenty-five Thousand Dollars ($25,000.00) on April 30th would entitle Blochman to the releases without injuring plaintiff, but if paid on May 1st, the following day, would injure plaintiff; in

other words, one day's possession of the property would damage the plaintiff to the extent it contends. Plaintiff did not attempt to prove, nor could it prove, nor can it now contend that the release of lots on June 28th would injure it to any greater extent than if released on May 1st. The delay in the payment of money certainly could prove no injury, for it has not only waived the same but it also received the interest from May 1st to June 28th, and nothing intervened to create any further liability. But plaintiff well knows this fact, and therefore does not attempt to stand upon the equities of the case, but on the contrary on the strictest construction permissible at law on the terms of the contract, namely; that the rights of the parties had been forfeited by an alleged failure to perform alleged conditions at particular dates and these dates within a time so short of the actual dates of performance as to be almost negligible at law. The contentions of plaintiff on this phase of the question are without foundation in equity or justice.

7. Any Uncertainty in the Release Provisions Must be Construed Against Plaintiff.

If there is any uncertainty in this agreement with regard to the release provisions or any other matters, this doubt must be resolved in favor of the trustee and beneficiary and against the plaintiff, who prepared the instrument, according to the evidence in this case. (Tr., p. 355.)

> "A contract is to be construed most strongly against the party who prepared it or caused it to be prepared."

Noonan vs. *Bradley,* 19 L. Ed., 757, 9 Wall., 394;

Yoch vs. *Home Mutual Insurance Co.,* 111 Cal., 503-508;

Welch vs. *British American Assurance Co.,* 148 Cal., 223;

Civil Code of California, Sections 1636, 1648, 1650 and 1654;

Laidlaw vs. *Marye,* 133 Cal., 170;

Payne vs. *Neuval,* 155 Cal., 46.

And in *King* vs. *Samuel,* 7 Cal. App., 69, this doctrine was held to apply to the party who prepared a deed, applying Section 1654 of the Civil Code, *supra.*

8. The Trustee is Protected by General Rules of Law and Equity.

The acts of the trustee regarding releases were in conformity with its understanding and practice in the case of numerous similar trusts and its acts in that respect had never been questioned by the interested parties, and its custom had been for years to do precisely what it did in this case. (Tr., p. 423.) Moreover, with regard to release of lots upon payment of interest, it was following advice of its counsel after due consideration. (Ex. 55-56, Tr., pp. 507-508.)

There is not and cannot be any question that the trustee acted in good faith in all that it did in this matter; that it believed it had authority to do all it did and that it was pursuing a custom of long standing.

In *Ellig* vs. *Naglee,* 9 Cal., 684, it is held that when trustees act in good faith in the management of the trust property and without selfish motives, they are entitled to be treated by a court of equity with liberality and indulgence, *especially when they act under the advice of*

counsel. Supine negligence or wilful default will render them liable, but to make them liable for mere errors of judgment would tend to discourage prudent men from undertaking trusts. Under the California law a trustee is bound to use only ordinary care and diligence in the execution of its trust. (Section 2259, Civil Code.)

> "A trustee has authority to adopt measures and do acts which, though not specified in the instrument, are implied in its general directions and are reasonable and proper means for making it effectual."
>
> *Gilbert* vs. *Penfield,* 124 Cal., 238;
>
> 2 *Pomeroy's Equity,* Section 1062;
>
> *Kipp* vs. *O'Melveny,* 2 Cal. App., 142.

And as regards the liability of a trustee on account of a wrongful sale, the general rule, as laid down in 39 Cyc. 364, protects the trustee in this instance. The rule is as follows:

> "A trustee who has made a wrongful sale is liable to account for the real value of the property instead of the price at which it was sold, but *the personal liability for the difference does not attach where he has acted in good faith and according to his best judgment.*"

The principles governing liability of trustees under a California deed of trust, such as is constituted by this instrument, were declared in a recent decision of the Supreme Court of this State (March 7, 1917) in the case of *Ainsa* vs. *Mercantile Trust Co.,* (53 Cal. Dec., 296, 300), and in that respect is squarely in point here as showing that the trustee cannot be held to the measure

of responsibility which plaintiff attempts to fix upon it. The importance of this decision justifies quoting in full these rules:

> "It is very evident that by becoming a trustee under such a deed and by issuing such a certificate the respondent did not assume any of the obligations which appellant seeks to place upon it. Ordinarily trustees are bound to a fair exercise of their judgments and to the unselfish exercise of good faith. 'Very supine negligence or wilful default will render them liable' but not mere errors of judgment. (*Ellig* vs. *Naglee,* 9 Cal., 683-695; *Estate of Cousins,* 111 Cal., 441-449; *Estate of Schandoney,* 133 Cal., 387-393.) The trustee of an express trust derives his power from the instrument creating that trust, and the same document furnishes the measure of his obligations. (Pomeroy's Equity Jurisprudence (3rd ed.) section 1062; 39 Cyc., 290-294) * * * * A trustee under a deed of trust does not assume the important obligations which are in some instances cast upon a trustee by operation of law. An ordinary trust deed is little more than a mortgage with power to convey (*Sacramento Bank* vs. *Alcorn,* 121 Cal., 379-383; *Curtin* vs. *Krohn,* 4 Cal. App., 131-135; *Hollywood Lumber Co.* vs. *Love,* 155 Cal., 270-273; *MacLeod* vs. *Moran,* 153 Cal., 97-99; *Tyler* vs. *Currier,* 147 Cal., 31-36; *Weber* vs. *McCleverty,* 149 Cal., 316-321). A trustee under an ordinary deed of trust is the common agent of both parties and is required to act impartially. (Cook on Corporations (7th ed.) page 3050; Jones on Mortgages (6th ed.) section 1771.)

Some *authorities hold that he is not a trustee at all in a technical sense.* (28 Am. and Eng. Enc. of Law (2nd ed.) page 765.)"

III.

THE PLAINTIFF IS ESTOPPED FROM QUESTIONING THE VALIDITY OF THE RELEASES.

This estoppel arises from a number of facts clearly established by the evidence. First, the plaintiff has been paid the stipulated amount to secure the release of the lots which were released by the Trustee, *and it has retained, and still retains, all of the money paid to it and at no time has it offered, or even suggested the return of any of this money to any of the defendants.* It cannot, while retaining the money paid to it to secure releases, question the giving of such releases unless it refunds the moneys so paid, *and this is so, no matter when it learned that the releases had been made.* In the case at bar, $28,464.07 was paid to the Trustee in June, 1913, and the evidence may warrant the conclusion that the payment was made on or before the 28th day of that month, *and all the money was paid to secure the release of lots.* The Trustee, by telegram on June 30th, notified the plaintiff of the payment (Ex. 49, Tr., p. 501) and on the same day remitted to the Bank of California, the amount paid, for the credit of plaintiff (Ex. 51, Tr., p. 503) and on the same day, June 30th, the Trustee wrote the plaintiff a letter (Ex. 50, Tr., p. 502) stating the amount paid, the various items going to make up that amount and that it had been remitted to the Bank of California. On the 21st day of July, 1913, the plaintiff, by a letter addressed to the trustee (Ex. 54, Tr., p. 506)

acknowledged the receipt of the $28,464.07 and informed the Trustee that there was a balance due of $156.25, being interest on the principal of $25,000.00 from March 15th to May 1st, and asking the Trustee to collect this balance and explaining how it happened that the figures theretofore given the Trustee by the plaintiff had not been correct. In the same letter the plaintiff asked the Trustee for the names of the new Syndicate that had purchased the property. On August 7th, 1913, the plaintiff again wrote the Trustee (Ex. 57, Tr., p. 509) about this balance of $156.25 and asked the trustee to advise it "when the present owners of property intend to remit this amount". Again on September 12th, 1913, the plaintiff wrote the Trustee (Ex. 59, Tr., p. 511) about the interest that would be due September 15th and also about the said sum of $156.25 which had not been paid and stated that the total amount that would be due as interest on September 15th would be $2656.25. Again, on October 7th the plaintiff writes the Trustee (Ex. 61, Tr., p. 513) about the payments of this interest and on October 16th (Ex. 64, Tr., p. 516) the Trustee remitted the plaintiff $2671.75, less exchange, being interest on $100,000.00 amounting to $2500.00, the delinquent interest of $156.25 and the interest on interest amounting to $15.50. The receipt of this remittance was acknowledged by the plaintiff by its letter of October 21, 1913, addressed to the Trustee (Ex. 65, Tr., p. 517). In this same letter it asked the Trustee to advise the La Binda Park Syndicate at once that the payment of $25,156.25, principal and interest would be due on November 1st, 1913. Here the plaintiff from June 30th to October 22nd was in receipt of payments amounting

to more than $31,000.00, principal and interest, *accepted the same although made after the dates when they became due, knowing that they had not been paid at their maturity,* and asking for interest on delinquent interest. It was not until the beneficiary defaulted in the November payment that the plaintiff attempted to terminate the contract or to exercise its option to declare the whole amount due. It was standing on the contract all the time up to November 1st, and during this time it was insisting upon the performance of the contract by the beneficiary, even to the extent of compelling him to pay compound interest and exchange upon the remittance to the Bank of California, and making such insistence on the theory that the contract was in force and obligated the beneficiary to do the things demanded of him by it, the plaintiff. There can be no pretense that the plaintiff at any time between its receipt of the money on June 30, 1913, and November 1st of that year, did any act or thing looking toward the exercise of an option to terminate the contract or to mature all of the payments provided by it to be made. Therefore, during this period there was no default on the part of the beneficiary or his assigns. Neither he nor they was or were in default. If the payment in June was not made within the ten days mentioned in the notice given on the 17th of June to the beneficiary, it was accepted by the plaintiff, as were the later payments up to November 1st. No one word of complaint or inquiry is made as to whether the payment in June was made on the 27th, although the plaintiff must be deemed to have received notice that it was not, for it was not advised of the payment until the 30th, when it was told that the money had been remitted to the Bank

of California, but at all events it made no inquiry or objection, but began to clamor for compound interest. This was in July, and it kept up its clamor until it was paid in October, all the time retaining the payment of $28,-464.07 made to it in June. We say again, that the contract was, during all this time and until November 1st, in full force and effect and the beneficiary possessed of all the rights under it that he ever had. Under plaintiff's theory of the case as now advanced, it was entitled to take the June payment and the compound interest in July and October, leading the beneficiary and the trustee to believe that the plaintiff was relying upon the contract, and yet now repudiate it and say that the beneficiary was in default all of this time because $25,000.00 had not been expended in subdividing the land and preparing it for sale before March 1st, 1913. We unhesitatingly say that such a theory is so repulsive to every instinct of justice that it should not for a moment be entertained. Not only is this theory now advanced by the plaintiff, but it claims that it did not know of the subdivision of the land or the release of lots until in December, 1913 (although the evidence proves otherwise, as we have pointed out), and that it can now take advantage of the failure to expend the $25,000.00 before March 1st, all the while retaining the $31,000.00 that has been paid to it by the beneficiary and received by it while both parties were treating the contract as in full force.

We insist that the plaintiff cannot, while it retains this money, deny the right of any of the defendants to releases of the lots or the authority of the Trustee to make them.

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

California Civil Code, Section 1589.

This principle is very clearly stated and pertinently applied in the case of *Farmers' and Merchants Bank of Elk Creek* vs. *Farmers & Merchants National Bank of Auburn,* 68 N. W., 488, where the court said:

"The rule is that a principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge, or he will be bound thereby; and a principal will not be permitted to adopt that part of a contract made by his agent which is beneficial to him and reject the remainder * * * It does not clearly appear when the Farmers Bank first became aware of the transaction made the subject-matter of this suit, but if it was not aware of the action of its cashier before, *it learned at the time of the trial* that the collateral notes pledged to secure the notes of the Elk Creek Bank had been turned over to it (the Farmers' Bank) and that they were still in its possession. It was not too late even then for the Farmers' Bank to disaffirm the act of its Cashier, if at that time it first became aware of such act; and, if it then desired to disaffirm the act of its cashier, it should *on the trial* have amended its answer and set out what Holmes had done, that his acts were unauthorized and that it had then, for the first time discovered that it held the collateral notes which had

been surrendered by the Auburn Bank and returned or offered to return them or their proceeds to the Auburn Bank. Not having done this or attempted to do it, we are of the opinion that the District Judge was right and that the Farmers' Bank, *by retaining the collateral* surrendered by the Auburn Bank at the time the note in suit was given to it, thereby *ratified the act of its Cashier; and the judgment is affirmed.*"

The same doctrine is very clearly stated in the case of *Mundorff* vs. *Wickersham,* 63 Pa. State 87, where the court said:

"If an agent obtains possession of the property of another, by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or, if he received it, it must be subject to the condition upon which it was parted with by the former owner. This proposition is founded upon a principle which pervades the law in all its branches: *Qui sentit commodum, sentire debet et onus.* The books are full of striking illustrations of it, and more especially in cases growing out of the relation of principal and agent. Thus, where a party adopts a contract which was entered into without his authority, he must adopt it altogether. He cannot ratify that part which is beneficial to himself and reject the remainder; he must take the benefit to be derived from the transaction *cum onere; Broom's Legal Maxims,* 632; *Hovil* vs. *Pack,* 7 East, 164; *Coleman* vs. *Stark,* 1 Ore., 115. In the familiar case of the sale of a horse by a servant, who, without authority, warrants the sound-

ness of the animal; the master having received the price enhanced by the warranty, even though ignorant of it, is responsible. *Nelyear* vs. *Hawke,* 5 Esp., 72."

"If a party makes an agreement through an agent and claims under it, he cannot repudiate it in part on the ground that the agent exceeded his authority." *Smith* vs. *Smith,* 80 Cal., 323.

The present action, is in effect, one for rescission; at least plaintiff has acted on that theory in its treatment of the case. It is attempting to rescind the contracts of its agent, the Trustee, growing out of the releasing of lots, by repudiating the original releases as unauthorized and invalid. But it cannot rescind without returning the benefits derived from the repudiated acts, even if, as it claims, it did not learn the facts until the trial, for then it should have amended its complaint and offered to return the money, in order to make its rescission complete or effective, and not having done so, under the authority of *Farmers and Merchants Bank of Elk Creek vs. Farmers and Merchants Bank of Auburn, supra,* it must be held to have ratified the Trustee's acts, and the decree of the District Court should be affirmed.

In concluding this division of the argument, it will not be amiss to call the observation of the court to the fact that the evidence is indefinite and contradictory as to the dates when the amounts making up the release prices were received by the Trustee or by the Trustee credited to plaintiff's account. As for instance the testimony of plaintiff's witness, Taggart (Tr., p. 369), in speaking of the amounts making up the cash slip, (Ex. 105) totaling $19,064.07, is that "this date 6-27-13 indi-

cates the date I placed it to the credit of the United Real Estate and Trust Company on the books of our Company." The 27th day of June, 1913, the date intended by that statement was the last day, according to plaintiff's argument, on which the May installment could have been paid. Also it appears from the testimony regarding the $2500.00 borrowed by the Kiblers from the United States National Bank of San Diego (Tr., 419) that the note evidencing this loan was dated June 27, 1913. Furthermore, the check of R. W. Haskins for $5000.00 in payment for his five lots was dated June 26, 1913 (Tr., p. 368). Nor were the cash slips receipts; they were merely memorandums for the use of the bookkeeper (Tr., pp. 368-369), and therefore not conclusive as to the date on which the money was received. As to the $10,000.00 received from the United States National Bank on its loan on the ten lots, it appears from the testimony of Mr. Porter (Tr., pp. 384-385) that a meeting of the Directors of the La Binda Park Syndicate was held "the morning of the last day we were to furnish this money" at which a resolution was passed to the effect that the certificate of deposit of the United States National Bank be rediscounted at the rate of eight per cent. per annum; that the loan was actually made on the 26th day of June, 1913. (Ex. 91, Tr., p. 549.)

The evidence in this regard being unsatisfactory and inconsistent, an Appellate Court is not justified in assuming that payment was made of the entire sum on June 28, 1913, instead of in smaller amounts prior to that date.

IV.

CONCERNING THE ALLEGED ESTOPPEL OF BLOCHMAN'S ASSIGNS TO QUESTION VALIDITY OF PLAINTIFF'S LIEN.

The Opening Brief (pages 73 to 86 inclusive) is concerned with the argument of plaintiff that parties dealing with Blochman were charged with notice of the trust agreement and that if plaintiff's contentions are correct they are estopped to deny the existence, priority or validity, of its lien.

A sufficient answer to this is, that not all of these subsequent parties are before the court and have had no opportunity to advance their claims, and therefore no judgment *in rem* binding the property, such as plaintiff insists on, could possibly be binding upon the interest of these other parties.

V.

THE DECREE WAS NOT IN ERROR IN COMMITTING THE MATTER AND MANNER OF SALE TO THE TRUSTEE AND ALLOWING IT COMPENSATION AND ATTORNEY'S FEES.

We have hereinbefore submitted authorities sustaining the principle that an instrument in the form of the trust agreement is an ordinary deed of trust securing indebtedness, and cannot be foreclosed as a mortgage, but for its remedy the creditor must have recourse to the provisions of the trust. Nor do we consider it an act of impropriety that the trustee should assume this position, for plaintiff's sole reason for desiring a sale by another than the Trustee is founded upon its unwarranted accusations of abuse and violation of trust on the part of the

Trustee, of which the Trustee, we submit, was not guilty. Therefore, failure of the Trustee to support the decree of the District Court in these particulars might be construed as a concession on its part that the charges had some foundation in fact. For that reason, if for no other, we urge that in view of the fact that the Trustee was guiltless the decree should stand.

VI.

CONCLUSIONS.

In conclusion, we beg to submit that it has been fully proven in this case

First: That at the time of its waiver of existing defaults on May 23, 1913, plaintiff had full and complete knowledge of the fact that the land had been subdivided according to law.

Second: That the trustee was in no wise or to any extent bound to see that any of Blochman's covenants were kept or performed.

Third: That if plaintiff was injured by any default of Blochman in the performance of his covenants, such injury arose solely from its own negligence and failure to make proper inquiries.

Fourth: That the Trustee was not bound to inform plaintiff of the fact that releases of lots were made by it upon payment of principal and interest, and that if plaintiff was in any respect injured thereby, then such injury arose from its own negligence in failing to request information thereof from the Trustee, or from its own misconstruction of the Trust Agreement.

Fifth: That the map and subdivision of the land were properly and lawfully made.

Sixth: That the Trustee did not misrepresent or conceal any material facts from the plaintiff, and that plaintiff's waivers were made with full knowledge of the fact of subdivision of the land and of all matters transpiring prior to such waivers, and were not made upon any misrepresentations or suppression of facts by the Trustee.

Seventh: That the sales to Kibler and Haskins were bona fide and the various hypothecations of lots were valid (so far as the Trustee was concerned and so far as its knowledge extended).

Eighth: That the Trustee acted fairly and that it faithfully performed its duties under the trust, and now stands ready and willing to complete the trust.

From which facts, and the law and authority herein cited, we submit:

1st: That plaintiff's acceptance of the monies remitted to its account June 30, 1913, and October 16, 1913, operated as a complete waiver of all prior default and withdrawal of election to accelerate maturities of principal and interest.

2nd: That the release clauses in the trust agreement were independent of Blochman's covenants.

3rd: That in any event Blochman's breaches of covenants did not impair the Trustee's power to make releases.

4th: That releases were as valid for the purpose of hypothecations as for the purpose of sale.

5th: That the Trustee was not the general agent of the plaintiff, and therefore not bound to inquire as to existing defaults or require the purging of such defaults before making releases.

6th: That all releases made by the Trustee were valid.

7th: That plaintiff cannot keep the money which the defendants and other parties paid to the Trustee in order to obtain releases of lots and at the same time hold the property.

8th: That the decree directing the Trustee to complete the trust and allowing it compensation and attorney's fees is entirely justified and should stand.

Respectfully submitted,

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